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ABSTRACT

The paper analyzes options for coordinating the administration of Section 504 of the Rehabilitation Act of 1973 and Part B of the Education of the Handicapped Act (EHA) as amended by P.L. 94-142, the Education for All Handicapped Children Act. The 4 week study involved a review of documents concerning the legal and administrative framework governing the administration of the two Acts and interviews with persons involved in their administration at the federal, state, and local levels as well as representatives of advocacy groups. After an introduction, the paper analyzes the relationships between the standards set out in Section 504 and Part B of EHA. The third part identifies the multiplicity of departments, offices, divisions, branches, and persons involved in the administration of Section 504 and Part B of EHA at the federal, state, and local levels. The fourth part describes and analyzes the procedures for developing, issuing, compiling, and disseminating policy. The final part of the paper considers the procedures for initiating, investigating, and notifying persons and agencies of noncompliance: the relevant sanctions: and the procedures governing the use of particular sanctions under Section 504 and Part B of EHA. Among recommendations are that the Secretary of Education issue a comprehensive statement to explain the relationship between the specific standards set out in Section 504 and Part B of EHA, and that the Education Department consider developing a consolidated enforcement procedure under which joint actions may be brought by the Office of Civil Rights and the office responsible for administering a grant program. (D9)

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OPTIONS FOR
COORDINATING THE
ADMINISTRATION OF SECTION 504
AND PART B OF EHA

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April 10, 1980

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Dear Burton:

This letter transmits a paper which analyzes options for coordinating the administration of Section 504 of the Rehabilitation Act of 1973 and Part B of the Education of the Handicapped Act, as amended by P.L. 94-142.

Sincerely,



Robert Silverstein

Enclosure

The work upon which this paper is based was performed under contract number 300-80-0196 with the USOE, DOE Transition Team. The findings, conclusions, and recommendations contained in this report do not necessarily represent the views of USOE or the DOE Transition Team.

TABLE OF CONTENTS

Introduction

	<u>Page</u>
I. <u>Overview of Section 504 and Part B of EHA</u>	1
II. <u>Purpose of this Paper</u>	3
III. <u>Limitations of this Paper</u>	3
IV. <u>Methodology</u>	4
V. <u>Organization of the Paper</u>	5
VI. <u>Abbreviations</u>	5
VII. <u>Major Findings, Conclusions, and Recommendations</u>	6
A. Relationship Between the Standards Set Out in Section 504 and Part B of EHA	6
B. Multiplicity of Agencies and Offices Involved in the Administration of Section 504 and Part B of EHA	7
C. Development, Issuance, Compilation and Dissemination of Policy	9
D. Initiation, Investigation, Notification of Noncompliance and Sanctions and Procedures for Effecting Compliance	10

Relationship Between Section 504 and Part B of EHA

I. <u>Introduction</u>	15
II. <u>Areas Where There Are No Overlaps</u>	15

	<u>Page</u>
III. <u>Major Areas of Overlap</u>	16
A. Basic Concepts	16
B. The Standards Implementing the Concepts	17
1. Introduction	17
2. The Definition of Handicapped Persons	18
3. The Definition of the Term "Special Education"	18
4. The Definition of the Term "Related Services"	19
5. Scope of the Grantee's Obligation	20
6. The Meaning of the Phrase Compliance With Part B of EHA is "One Means" of Meeting the Section 504 Standards	21
7. Child's Status During the Pendency of an Administrative or Judicial Proceeding	22
8. Provision of Regular Physical Education	22
IV. <u>Attempts to Resolve the Problems</u>	23
V. <u>Findings, Conclusions, and Recommendations</u>	23

Multiplicity of Agencies Responsible for
Administering Section 504 and
Part B of EHA

I. <u>Introduction</u>	25
II. <u>Administration of Section 504 Under Current Law</u>	25
A. Federal Level Administration	25
B. State Level Administration	27
C. Local Level Administration	27

III.	<u>Administration of Part B of EHA Under Current Law</u>	27
	A. Federal Level Administration	27
	B. State Level Administration	28
	C. Local Level Administration	29
IV.	<u>Administrative Structure Under DEOA</u>	29
V.	<u>HEW Attempts to Improve Coordination</u>	31
VI.	<u>Findings, Conclusions, and Recommendations</u>	33
	A. Findings and Conclusions	33
	B. Recommendations	35
	C. Establishment of a Single Office With Responsibility for Developing Policy and Compliance and Enforcement Under Section 504 and Part B of EHA: The Pros and Cons	36

Developing, Issuing, Compiling and
Disseminating Policy

I.	<u>Introduction</u>	39
II.	<u>Development and Issuance of Policy</u>	39
	A. Introduction	39
	B. The Meaning of the Term "Policy"	40
	C. Legal and Administrative Frameworks	42
	1. Legal and Administrative Frameworks Under Section 504	42
	a. The Legal Framework	42
	b. The Administrative Framework	44
	2. Legal and Administrative Frameworks Under Part B of EHA	45
	a. Legal Framework	45
	b. The Administrative Framework	47

	<u>Page</u>
D. Present Procedures for Coordinating Policy Development and Issuance	47
E. Proposals for Improving the Coordination Between BEH and OCR	47
F. Findings, Conclusions, and Recommendations	49
III. <u>Compilation and Dissemination of Policy</u>	51
A. Introduction	51
B. The General Legal Framework Under Section 504 and Part B of EHA ..	53
C. The Specific Legal and Administrative Framework Under Section 504	54
1. Legal Framework Under Section 504	54
2. Administrative Framework	54
D. Legal and Administrative Framework Under Part B of EHA	56
E. Attempts to Develop a System for Compiling and Disseminating Policy	56
F. Findings, Conclusions, and Recommendations	56

Enforcement

I. <u>Introduction</u>	60
II. <u>The Policies and Procedures Governing the Initiation, Investigation, and Notification of Noncompliance</u>	60
A. Introduction	60
1. The Framework Under Section 504	60
2. The Framework Under Part B of EHA	64
B. Problems with the Present Framework	65

	<u>Page</u>
C. Attempts to Coordinate the Initiation, Investigation, and Notification of Noncompliance	66
D. Findings, Conclusions, and Recommendations	69
III. <u>Administrative Actions and Procedures for Securing Compliance</u>	72
A. Introduction	72
B. The Legal Framework Under Section 504	72
1. Overview	72
2. Due Process and Other Procedures Governing the Use of Fiscal Sanctions	76
3. Procedures Governing the Use of "Other Means Authorized By Law"	76
4. Hearings	77
5. Decisions and Notices	77
a. Decisions by Hearing Examiners	77
b. Decisions on the Record or Review by the Reviewing Authority	78
c. Review by the Secretary	78
d. Transmittal to Congressional Committees	78
6. Post-termination Proceedings	79
7. Judicial Review	79
C. Sanctions Available Under Part B of EHA	79
1. Federal Level	79
a. Overview	79
b. Panels and Boards Established to Hear Cases Alleging Noncompliance	80
i. Introduction	80
ii. Hearing Panel Established Under Part B of EHA	80

	<u>Page</u>
iii. Educational Appeals Board	81
c. Disapproval of State Plans	81
d. Withholding	81
e. Suspension Pending Decision to Withhold	83
f. Auditing	83
g. Payback of Recovered Funds	84
h. Cease and Desist Orders	85
i. Waiver of Supplanting Provisions	86
j. Monitoring and Technical Assistance	86
k. Changing the System for Making Payments Under Part B of EHA	86
l. Reporting and Evaluation	87
m. Judicial Review	87
2. State and Local Level Sanctions and Procedures	87
a. Overview	87
b. Certifications	88
c. Single Line of Authority	88
d. Application Approval	89
e. Withholding	89
f. Public Notice of Withholding Action	90
g. Monitoring and Evaluation	90
h. Audits	90
i. Complaint Resolution Procedures	90
j. Proper Use of Part B Funds	91
k. Enforcement of Confidentiality of Information	91
l. Recovery of Funds for Children Erroneously Classified ...	91

	<u>Page</u>
m. Administrative Appeal of Due Process Hearings and Right to Bring Civil Action	91
n. Plans for Administrative Activities for the Upcoming Year	91
o. Annual Evaluation	92
p. Direct Services by the SEA	92
q. Enforcement Actions Applicable at the Local Level	92
r. Appeals to the Secretary of Adverse Actions Taken By an SEA Against an LEA	93
D. Problems with the Present Legal Framework, as Modified by DEOA	94
E. Attempts to Address the Problem	95
F. Findings, Conclusions, and Recommendations	95

Introduction

I. Overview of Section 504 and Part B of EHA

In recent years, Congress has enacted two laws that provide significant procedural and substantive protection for handicapped children.

These laws are:

- o Section 504 of the Rehabilitation Act of 1973 (Section 504) 1/ and
- o Part B of the Education of the Handicapped Act, as amended by P.L. 94-142 (Part B of EHA). 2/

Section 504 is the "first civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap." 3/ Section 504 states:

No otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Because Section 504 is a civil rights law, burdens and costs associated with ensuring equal opportunity provide no basis for exemption from the provisions of the law or regulations. 4/ Section 504 is currently administered by HEW's Office for Civil Rights (OCR). Under the Department of Education Organization Act (DEOA), 5/ primary responsibility for administering Section 504 is delegated to the Office for Civil Rights, which is directed by an Assistant Secretary. 6/

1/ 29 U.S.C. 794. Regulations implementing Section 504 appear in Part 84 of Title 45 of the Code of Federal Regulations (45 C.F.R. Part 84).

2/ 20 U.S.C. 1411-1420. Regulations implementing Part B of EHA appear in Part 121a of Title 45 of the Code of Federal Regulations (45 C.F.R. Part 121a).

3/ Preamble, 42 FR 22676 (May 4, 1977).

4/ Id.

5/ P.L. 96-88

6/ Section 203 of DEOA

Part B of EHA is a grant-in-aid program designed to assist grantees meet their civil rights obligations to handicapped children. A State Educational Agency (SEA) that accepts assistance under Part B of EHA agrees to abide by the terms and conditions set out in the statute and regulations. Part B of EHA is currently administered by the Bureau of Education for the Handicapped (BEH). Under the DEOA, Part B of EHA will be administered primarily by the Office of Special Education and Rehabilitative Services, which is directed by an Assistant Secretary.^{7/}

The basic requirements common to Section 504 and Part B of EHA are that:

- (1) handicapped persons, regardless of the nature or severity of their handicaps, be provided a free appropriate public education;
- (2) handicapped students be educated with non-handicapped students to the maximum extent appropriate to their needs;
- (3) educational agencies undertake to identify and locate all unserved handicapped children;
- (4) evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students; and
- (5) procedural safeguards be established to enable parents to influence decisions regarding the evaluation and placement of their children.^{8/}

In several respects, however, the Section 504 and Part B of EHA are different. For example, the Section 504 regulation covers subjects not covered by Part B of EHA, including such areas as program accessibility and employment discrimination. On the other hand, Part B contains a

^{7/} Section 207 of DEOA.

^{8/} Section-by-section analysis, 42 FR 22690 (May 4, 1977); See also 42 FR 42504 (August 23, 1977).

number of administrative requirements not included under Section 504 including, the submission of state plans and local applications.^{9/}

II. Purpose of this Paper

Since the regulations implementing Section 504 and Part B of EHA were published in the Federal Register, persons within OCR and BEH, representatives from SEAs, local educational agencies (LEAs), and groups representing handicapped children have been voicing their concern over the relationship between Section 504 and Part B of EHA and the need for the federal government to pursue a coordinated implementation strategy. Specific concern has been voiced regarding policy development and compliance and enforcement efforts. A person representing two state-level organizations, in recent testimony before Congress, expressed his concern this way:

Unless state and local education agencies can be assured of a clear and consistent interpretation of their responsibilities [by OCR and BEH], they will remain in various stages of confusion and will fall short of their shared goals.^{10/}

The purpose of this paper is to analyze present efforts to coordinate policy development and compliance and enforcement of Section 504 and Part B of EHA and then offer recommendations for improving coordination.

III. Limitations of this Paper

This paper was prepared in four weeks pursuant to the terms of the contract. Therefore, the limitation of time affected the manner in which recommendations are presented. In general, the recommendations express directions

^{9/} 42 FR 42504 (August 23, 1977).

^{10/} Statement of Dr. Thomas Schmidt, Commissioner of Education, State of Rhode Island on behalf of the Council of Chief State School Officers and the National Association of State Directors of Special Education before the Subcommittee on the Handicapped, Committee on Labor and Human Resources, United States Senate, March 3, 1980.

in which we feel the department should be moving and key variables which affect our proposals. They do not contain detailed blue prints for action. The limitation of time also prevented us from addressing the issues of coordination regarding data collection and the provision of technical assistance.

IV. Methodology

To achieve the objective of the paper, we reviewed the federal legal and administrative framework governing the administration of Section 504 and Part B of EHA. Documents reviewed included: (1) The Section 504 statute, regulations (including the Title VI procedural regulations incorporated by reference by the Section 504 regulation), policy interpretations, and digests; (2) The Part B of EHA statute, regulations, DAS Bulletins, and draft policy interpretations; (3) The General Education Provisions Act (GEPA); (4) The interim final regulations implementing the Education Appeals Board established by Section 451 of GEPA; (5) The Title VI guidelines issued by the Department of Justice; and (6) A draft memorandum of understanding between BEH and OCR concerning coordination of the administration of Section 504 and Part B of EHA.

In addition to reviewing documents, we interviewed numerous persons involved with the administration of Section 504 and Part B of EHA at the federal, state and local levels. In addition, representatives of advocacy groups were interviewed.

V. Organization of the Paper

The paper is divided into five parts. The first part is the introduction. The second part analyzes the relationship between the standards set out in Section 504 and Part B of EHA. The third part identifies the multiplicity of departments, offices, divisions, branches, and persons involved in the administration of Section 504 and Part B of EHA at the federal, state, and local levels. The fourth part describes and analyzes the procedures for developing, issuing, compiling and disseminating policy. The final part of the paper describes and analyzes the procedures for initiating, investigating, notifying persons and agencies of noncompliance as well as the sanctions and procedures governing the use of particular sanctions under Section 504 and Part B of EHA.

VI. Abbreviations

The major abbreviations used in this paper are set out below.

"Section 504" is an abbreviation for Section 504 of the Rehabilitation Act of 1973.

"Part B of EHA" is an abbreviation for Part B of the Education of the Handicapped Act, as amended by P.L. 94-142.

"GEPA" is an abbreviation for the General Education Provisions Act.

"DEOA" is an abbreviation for the Department of Education Organization Act.

"ED" is an abbreviation for the Education Department.

"OCR" is an abbreviation for the Office for Civil Rights

"BEH" is an abbreviation for the Bureau of Education for the Handicapped.

"POC" is an abbreviation for Program Operating Component. Within HEW, the Office of Education was a "POC".

"OGC" is an abbreviation for the Office of the General Counsel.

"OGC/CR" is an abbreviation for the Civil Rights Division of the Office of the General Counsel.

"SEA" is an abbreviation for State Educational Agency.

"LEA" is an abbreviation for Local Educational Agency.

"LOF" is an abbreviation for a letter of findings issued by OCR.

"MOU" is an abbreviation for a memorandum of understanding.

VII. Major Findings, Conclusions, and Recommendations

A. Relationship Between the Standards Set Out in Section 504 and Part B of EHA

There is confusion about the relationship between specific standards set out in the regulations implementing Part B of EHA and the standards set out in the Section 504 regulations.^{11/} Uncertainty exists in such areas as:

- o the definition of the term "special education,"
- o the definition of the term "related services,"
- o the scope of an LEA's obligation (Part B requires the provision of special education and related services to all handicapped children whereas Section 504 requires the provision of regular and special education and related services in a non-discriminatory fashion),
- o the meaning of the phrase in the Section 504 regulation that compliance with Part B of EHA is one means of complying with Section 504, and
- o a child's status under Section 504 during the pendency of an administrative or judicial proceeding.

^{11/} In addition, significant confusion was expressed regarding the relationship between Section 504, Part B of EHA, and Title VI, especially with respect to the placement of black and limited-English proficient students in separate programs for handicapped students.

We recommend that the Secretary issue a comprehensive statement that explains the relationship between the specific standards set out in Section 504 and Part B of EHA. The policy statement should:

- (1) identify the areas of overlap,
- (2) explain the circumstances under which the more detailed definitions contained in Part B of EHA are applicable to Section 504,
- (3) explain LEAs' and SEAs' obligations under the two laws when the standards under one law appear, on their face, to be inconsistent with the other law, and
- (4) explain what is meant by the statement that compliance with Part B of EHA is one means of complying with Section 504.

In addition, the policy statement (or a separate policy statement) should explain the interrelationship between Title VI, Section 504, and Part B of EHA.

B. Multiplicity of Agencies and Offices Involved in the Administration of Section 504 and Part B of EHA

There are a multiplicity of agencies and offices involved in the administration of Section 504 and Part B of EHA at the federal, state, and local levels.

At the federal level, Section 504 is presently administered by OCR. Within OCR there are at least five offices involved with policy development and compliance and enforcement. In addition, OCR has ten regional offices. Secondary responsibility for administering Section 504 is performed by the Civil Rights Division of the Office of the General Counsel (OGC/CR), program operating components (POCs) (such as the United States Office of Education), and the Special Litigation, Civil and Civil Rights divisions at the Department of Justice. At the state level, SEAs have responsibility for overseeing the operation of programs operated by subrecipients

(e.g., LEAs). At the local level, the central administration is responsible for ensuring compliance with Section 504.

The administration of Part B of EHA at the federal level is primarily performed by BEH. Within BEH, the Division of Assistance to States, the Associate Deputy Commissioner, and the Deputy Commissioner are responsible for policy and compliance and enforcement. Secondary responsibility is performed by the Education Division of OGC, the Office of Inspector General, and the Civil, Civil Rights, and Special Litigation divisions at the Justice Department.

At the state level, responsibility for oversight rests with the SEA. At the local level, the LEA must ensure proper administration of the program.

Under DEOA, OCR apparently will retain its primary responsibility for administering Section 504. OGC/CR may lose some of its responsibilities. The involvement of POCs under the new department is uncertain. The Justice Department's role is unaffected.

Under DEOA, the Office for Special Education and Rehabilitative Services will apparently have primary responsibility for administering Part B of EHA. Secondary responsibility will still be assumed by OGC, the Office of the Inspector General, and the Justice Department.

The existence of so many offices with responsibility over Section 504 and Part B of EHA requires the establishment of formal coordination agreements; the present informal arrangement whereby one representative from BEH and one representative from OCR meet over breakfast is inadequate.

We recommend that the basic ideas set forth in a draft memorandum of understanding between OCR and BEH, which is presently circulating within HEW, be adopted, with certain modifications.

Support for the basic concepts imbedded in the draft memorandum of understanding is subject to one important qualification; the allocation of sufficient staff and resources to enable the system to operate. If the persons responsible for coordination are overwhelmed with other responsibilities, the effort will fail. Additional recommendations which address the fact that a multiplicity of offices are involved in the administration of the two laws are described infra.

C. Development, Issuance, Compilation and Dissemination of Policy

Since the dates the regulations implementing Section 504 and Part B of EHA were issued, approximately two and a half years have passed. In that time, OCR has published two policy interpretations in the Federal Register clarifying provisions applicable to elementary and secondary education programs. In the same period, BEH has not published a single clarification in the Federal Register. Policy interpretations not published in the Federal Register appear in a digest of significant case related memoranda (prepared by OCR), DAS Bulletins (prepared by BEH), correspondence (prepared by BEH and OCR), legal memoranda (prepared by OGC/CR and OGC), and legal briefs (prepared by the Justice Department).

A major obstacle to good relations between HEW and SEAs and LEAs as well as to effective compliance and enforcement is the failure to make and widely disseminate policy. The articulation of policy in documents which are not widely disseminated has not broken down this obstacle. Where a multiplicity of agencies and persons at the federal,

state, and local levels are involved in the administration of two laws, a written system for compiling and disseminating policy contained in numerous documents is necessary to avoid inconsistent interpretations and duplication of effort.

We recommend the development of a comprehensive reporter service by the new department which contains all relevant policies and the periodic issuance of a policy manual which synthesizes the policies contained in the reporter service as of a given point in time.

D. Initiation, Investigation, Notification of Noncompliance and Sanctions and Procedures for Effecting Compliance

Set out below are our major findings, conclusions, and recommendations regarding compliance and enforcement.

First, under Part B of EHA, BEH must approve a state plan submitted by the SEA. Several SEAs, as well as OCR representatives, reported that OCR has found policies which already had been approved by BEH to be violative of Section 504. It is untenable for the federal government to require compliance with two complex laws and then give mixed signals regarding what constitutes compliance. We recommend that OCR "sign-off" on state plans regarding their compliance with Section 504. This procedure will provide SEAs with advance notice regarding OCR's position on the adequacy of their policies. This recommendation assumes that OCR will have an adequate level of staff and resources to carry out this additional responsibility.

Of course, under this recommendation, OCR can bring a subsequent action against an SEA if (a) the policy does not violate Section 504 on its face but has a discriminatory effect, (b) if the SEA fails to administer its policies in accordance with its policies, (c) if the SEA changes its policy, or (d) the OCR staff person approves a state plan which, on its

face, is inconsistent with the Section 504 regulation and policy interpretations published in the Federal Register. If subsequent to the approval of a plan, OCR changes its policy, it must notify the state and provide it with a reasonable amount of time to come into compliance.

Second, the present system of coordination, which relies on periodic informal meetings over breakfast, is inadequate. Although some persons within BEH and OCR in Washington may know what the other agency is doing, there is no assurance that others in headquarters or in the regions are being informed. The proposal to improve coordination in the draft MOU is a significant improvement. However, we find that there are certain areas which could be improved.

- (a) The proposed contents of the monthly report are insufficient. The report must include a brief statement of the facts and a statement of the issue (if and when such statements are possible).
- (b) The draft MOU gives the impression that BEH has its own procedure for investigating complaints, even though no such procedure presently exists. If BEH is agreeing to obtain descriptions of complaints from the SEAs, this point should be clarified.
- (c) The procedures concerning OCR deferral to BEH are unclear, especially in light of the Adams order.^{12/}
- (d) The draft MOU does not address the problem of joint administrative actions against a non-compliant recipient following an investigation.

Third, there is a significant problem regarding the incompatibility between the procedures for effecting compliance under Section 504 and Part B of EHA.

^{12/} OCR is currently under court-ordered deadlines within which it must conduct compliance reviews of and commence enforcement proceedings against recipients found in violation of civil rights laws. Brown v. Weinberger, 417 F. Supp. 1215 (1976), Adams v. Richardson, 356 F. Supp. 92 (D.C.D.C. 1973), mod. 156 U.S. App. D.C. 267, 480 F. 2d 1159 (1973), Sub. nom. Adams v. Califano, 430 F. Supp. 118 (1977).

The problems with the present legal framework, as modified by DEOA can best be explained by way of illustration. Assume that a state adopts a policy which provides that LEAs are not required to provide a free appropriate public education to handicapped children. The policy clearly violates both Section 504 and Part B of EHA. Nonetheless the State claims that its policy is consistent with Section 504 and Part B of EHA. OCR and BEH decide to seek compliance by initiating enforcement action. The SEA demands a hearing.

Common sense would dictate that any system of enforcement established by the Education Department would (a) permit OCR and BEH to bring a single action against the SEA and (b) enable the SEA to defend against the action in a single forum.

Unfortunately, such is not the case! An action to withhold or terminate funds could actually proceed in three forums, subject to three sets of procedural requirements. For example, hearings regarding non-compliance with Part B of EHA are held before a Hearing Panel and/or the Educational Appeals Board. Hearing under Section 504 are held before a hearing examiner (administrative law judge) appointed in accordance with Section 11 of the Administrative Procedures Act. If the SEA wants to appeal the initial decision, three separate sets of procedures apply.

The problems described above are not limited to actions brought under Section 504 and Part B of EHA. The same problems occur anytime a particular SEA or LEA policy violates both a civil rights statute and a provision of a grant-in-aid program subject to GEPA.

The draft MOU between BEH and OCR referred to above provides that under certain circumstances BEH and OCR should conduct concurrent investigations. However, the MOU is silent with respect to the procedure the agencies should use once a violation has been found.

Subject to the proviso in the next sentence, we recommend that the Education Department consider developing a consolidated enforcement procedure under which joint actions may be brought by OCR and the office (e.g., BEH) responsible for administering a grant program.^{13/} We conclude that such a change should be made only if the department commits adequate staff and resources to carry out this recommendation. Every person interviewed regarding the proposed consolidation of procedures expressed a deep concern that the department would not allocate sufficient resources to enable the entity responsible for conducting the joint proceedings to do so in an effective and efficient fashion.

The second major finding is that the legal framework implementing Section 504 (including the HEW Title VI procedures which are incorporated by reference) does not include clear standards regarding an SEA's enforcement responsibilities and the procedures it must adopt when it does seek enforcement against an LEA or other agency operating an elementary or secondary education program. The lack of an adequate state-level framework contravenes the Title VI guidelines issued by Justice which require that Title VI regulations issued by federal departments must require that SEAs establish a Title VI compliance program that complies with the minimum standards established for federal agencies (28 C.F.R. §42.410). In contrast

^{13/}It is conceivable that before such a consolidation could occur, the Ed will be required to secure the approval of the plaintiffs in Adams.

to the Section 504 legal framework, the framework under Part B of EHA spells out in detail the range of sanctions SEAs are expected to use against non-compliant LEAs.

When the Education Department issues its Title VI enforcement procedures, it should include detailed provisions prescribing the responsibilities and procedures to be followed by SEAs. In drafting these procedures, ED must also ensure that state-level procedures for implementing Sections 504, Title VI, and Title IX, are consistent with the state-level procedures under Part B of EHA and other federal grant programs.

Relationship Between Section 504
and Part B of EHA

I. Introduction

This part analyzes the relationship between the concepts and standards set out in the legal framework implementing Section 504 and Part B of EHA. The first section is the introduction. The second section describes the areas where there are no overlaps. The third section analyzes the areas of overlap and raises such questions as: whether and the extent to which the standards in Section 504 are or should be interpreted as being identical to the Part B of EHA standards. The fourth section describes attempts by OCR and BEH to explain the relationships. The final section includes our findings, conclusions, and recommendations. The major recommendation is that the Secretary should issue a policy statement identifying which specific provisions set out in both legal frameworks are meant to be identical and which are not.

II. Areas Where There Are No Overlaps

Before identifying the areas of overlap, it is important to note that there are areas under each legal framework where there are no overlaps. These areas, which are described below, are not the subject of analysis in this paper.

The Section 504 regulation is broader than Part B of EHA in the sense that its scope is not limited to preschool, elementary, and secondary education programs and covers such areas as employment discrimination and program accessibility. The Section 504 regulation is divided into seven subparts.

- Subpart A: General Provisions
- Subpart B: Employment Practices
- Subpart C: Program Accessibility

Subpart D: Preschool, Elementary and Secondary and
Adult Education Programs

Subpart E: Postsecondary Education Programs

Subpart F: Health, Welfare, and Other Social
Service Programs

Subpart G: Compliance and Enforcement Procedures

Subparts A, B, C, and G of the regulation apply to all recipients of Federal financial assistance. The remaining subparts of the regulation contain more specific requirements applicable to the three major classes of recipients of assistance from HEW.

This paper generally does not discuss Subparts A, B, C, E, and F. The primary area of overlap and therefore the focus of this paper concerns provisions set out in subpart D. Subpart G is discussed in the part of the paper dealing with compliance and enforcement.

The Part B of EHA legal framework contains a number of requirements that are not common to Section 504, including for example, confidentiality provisions, excess costs and supplanting provisions, personnel development provisions, provisions concerning the priority for distributing Part B of EHA funds, and requirements concerning the submission of applications. These provisions are not discussed in this paper.

III. Major Areas of Overlap

A. Basic Concepts

The basic concepts common to Section 504 and Part B of EHA are that:^{14/}

- (1) handicapped persons, regardless of the nature or severity of their handicaps, be provided a free appropriate public education;

^{14/} See Section-by-section analysis, 42 FR 22690 (May 4, 1977); See also 42 FR 42504 (August 23, 1977).

- (2) handicapped students be educated with non-handicapped students to the maximum extent appropriate to their needs;
- (3) educational agencies undertake to identify and locate all unserved handicapped children;
- (4) evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students; and
- (5) procedural safeguards be established to enable parents to influence decisions regarding the evaluation and placement of their children.

These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.^{15/}

B. The Standards Implementing the Concepts

1. Introduction

It is one thing to say that the basic concepts set out in Subpart D of Section 504 and Part B of EHA are the same and quite another thing to conclude that all of the standards set out in the two legal frameworks are also identical. In fact SEAs and LEAs, as well as persons in the regional offices of OCR, point to the uncertainty regarding the actual overlap of the standards as causing significant frustrations. This subsection of the paper identifies some of the major areas where lack

^{15/} Section-by-section analysis, 42 FR 22690 (May 4, 1977).

of clarification has caused concern. No attempt is made to identify all areas of concern and confusion.

2. The Definition of Handicapped Persons

The definition of "handicapped persons" under Section 504 covers a broader population than the definition of "handicapped children" under Part B. Under Section 504, a handicapped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.^{16/} Under the Part B of EHA definition, a handicapped child is a child who has one or more of the impairments listed in the Act, who, because of that impairment requires special education and related services.^{17/}

Query: What are the practical implications of having two different definitions?^{18/}

3. The Definition of the Term "Special Education"

The term "special education" appears in both the Section 504 and Part B of EHA legal frameworks. The phrase is not defined in the Section 504 framework although the section-by-section analysis accompanying the regulation explains that special education may include specially designed instruction in classrooms, at home, or in private or public institutions.^{19/} The phrase is defined in the Part B of EHA regulation to mean:^{20/}

^{16/} 45 C.F.R. §84.3(j)(1).

^{17/} 45 C.F.R. §121a.5.

^{18/} The definitions set out in the regulations repeat the language set out in the respective statutes. Thus, the definitions cannot be changed by the new department but the effect or practical significance of the differences could be clarified.

^{19/} Section-by-section analysis, 42 FR 22690 (May 4, 1977).

^{20/} 45 C.F.R. §121a.14.

As used in this part, the term "special education" means specially designed instruction at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

The term includes speech pathology, or any other related service if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents to meet the unique needs of a handicapped child.

Queries: Does the term "special education" in the Section 504 context have the same meaning as the phrase set out in the Part B framework? If not, what is the difference? Why the difference?

4. Definition of the Term "Related Services"

The term "related aids and services" appears in the Section 504 legal framework and the term "related services" appears in the Part B of EHA legal framework.^{21/} The phrase "related aids and services" is not defined in the Section 504 legal framework although the section-by-section analysis accompanying the regulation explains that the term means developmental, corrective and other supportive services including psychological, counseling, and medical diagnostic services.^{22/}

The term "related services" in Part B of EHA is defined to mean:^{23/}

^{21/} 45 C.F.R. §84.33(b); 45 C.F.R. §121a.13.

^{22/} Section-by-section analysis, 42 FR 22690 (May 4, 1977).

^{23/} 45 C.F.R. §121a.13.

As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

Numerous controversies have surfaced regarding the meaning of the term "related services." For example, OCR has concluded that psychotherapy is a related service. BEH has said in one letter: "no it is not a related service" if it is provided by a psychiatrist or other licensed physician; but in a second letter BEH stated they are "studying" the issue and that psychotherapy provided by a physician might be regarded as a "basic related service."^{24/} Questions over catheterization as a related service have also been widely discussed.

Queries: Does the term "related services" under Section 504 and Part B of EHA have the same meaning? If not, what is the difference? Why the difference? What, if anything, is the significance of the word "aids" in the Section 504 mandate to provide "related aids and services?"

5. Scope of the Grantee's Obligation

Under Section 504, the term "appropriate education" includes, among other things, the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons. The scope of the recipient's obligation under

^{24/} See LOF issued against the Connecticut Department of Education (OCR 10/17/79); Jacobs letter (BEH, 7/21/78); and Millman letter (BEH, 6/5/79).

Part B differs in two respects. First, Part B of EHA does not cover the responsibility of grantees to handicapped children with respect to regular education because by definition a child is considered "handicapped" under Part B of EHA only if he/she is in need of special education and related services. Second, the obligation to provide special education and related services to handicapped persons under Part B of EHA is an absolute requirement in contrast with Section 504 where it is a relative standard ("as adequately as").

Queries: What is the significance of the additional requirement under Section 504 regarding the provision of regular education? Does the term "regular education" include compensatory education? Must recipients provide "related aids and services" to a handicapped child receiving regular education? What is the practical effect of the relative standard under Section 504 versus the absolute standard under Part B of EHA regarding the obligation to provide a free appropriate public education? Does the absolute standard mean that under Part B of EHA a handicapped child can never be expelled?

6. The Meaning of the Phrase Compliance With Part B of EHA Is "One Means" of Meeting the Section 504 Standards

In three instances, the Section 504 regulation provides that a Section 504 requirement may be met by complying with a Part B of EHA provision. §84.33(b)(2) (pertaining to the provision of an appropriate education) permits implementation of an individualized education program as one means of meeting the requirement. §84.35(d) indicates that re-evaluation procedures consistent with the Part B requirements is one means of meeting the reevaluation requirements under Section 504. §84.36 (per-

taining to due process safeguards) provides that compliance with the procedural safeguards in Part B is one means of meeting the Section 504 requirement.

Queries: If an LEA accepts assistance under Part B of EHA, do the Part B of EHA standards regarding the provision of an appropriate education, reevaluation, and due process, automatically become the relevant standards under Section 504? May OCR require more? Can LEAs argue that they are in compliance by showing less?

7. Child's Status During the Pendency of an Administrative or Judicial Proceeding

Under Part B of EHA, during the pendency of any administrative or judicial proceeding regarding a complaint (unless the parents and LEA agree otherwise) the child involved in the complaint must remain in his or her present educational placement.^{25/} The Section 504 framework is silent with respect to this issue.

Query: Does the Part B of EHA standard apply to proceedings under Section 504?

8. Provision of Regular Physical Education

Under Part B of EHA, each handicapped child must be afforded the opportunity to participate in the regular physical education program available to nonhandicapped children unless the child is enrolled full-time in a separate facility.^{26/} The Section 504 standard is different. Under Section 504, nonacademic services, such as physical education, must be provided to handicapped children in the same setting as nonhandicapped children, to the maximum extent appropriate to the needs of the handi-

^{25/} 45 C.F.R. §121a.513.

^{26/} 45 C.F.R. §121a.307(b)(1).

capped person.^{27/} The section-by-section analysis accompanying the regulation explains that this provision is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. "To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children."^{28/} The obligation to provide such an opportunity rests with the sending agency, the receiving agency, and the agency within which the residential school is located.^{29/}

Query: How is the apparent inconsistency between Section 504 and Part B of EHA to be resolved?

IV. Attempts to Resolve the Problems

Recently, SEAs and LEAs have requested that OCR and BEH develop a consistent policy concerning whether psychotherapy is a related service. Questions have also been raised regarding catheterization as a related service. BEH and OCR are working together in an attempt to develop a single policy regarding these issues (the procedures used for developing a single policy are discussed in the next part of this paper). However, the broader issue of the relationship between standards in Section 504 and Part B of EHA is not being addressed.

V. Findings, Conclusions, and Recommendations

When the regulations implementing Section 504 and Part B of EHA were published in the Federal Register in 1977, each regulation explained that the basic concepts contained in each regulation were the same. Since 1977, LEAs and SEAs as well as federal monitors have been

^{27/} 45 C.F.R. §84.34(b).

^{28/} Section-by-section analysis, 42 FR 22691 (May 4, 1977).

^{29/} See 45 C.F.R. §84.33(a) and section-by-section analysis, 42 FR 22690, 3d column, point 23 (May 4, 1977).

faced with the problem of determining whether and when the specific standards defining the basic concepts are also the same. Although the definition of "related services" under both laws has received most of the press, there are other uncertainties regarding the relationship between the standards in the two legal frameworks.^{30/}

Interview after interview at the state and local levels offered the same message:

Tell us what we must do and we will comply; but don't leave us guessing and don't make us figure out whether or not compliance with one law will ensure compliance with the other law. If the same definitions are applicable for both laws - tell us so -- if different definitions apply, tell us that as well -- just tell us.

We recommend that the Secretary issue a comprehensive policy statement that explains the relationship between the specific standards set out in Section 504 and the specific standards set out in Part B of EHA. At a minimum, the seven areas mentioned in the text should be addressed.^{31/} The policy statement should:

- (1) identify the areas of overlap;
- (2) explain when the more detailed definitions contained in Part B are applicable to Section 504;
- (3) explain the LEA's and SEA's obligations under both laws when the standards under each appear, on their face, to be inconsistent; and
- (4) explain what is meant by the statement that compliance with Part B is one means of complying with Section 504.

^{30/} Additional questions have been raised regarding the relationship between Title VI, Section 504, and Part B of EHA, particularly with respect to the placement of black and limited English-proficient students.

^{31/} A separate policy statement should be issued regarding the relationship between Title VI, Section 504, and Part B of EHA.

Multiplicity of Agencies Responsible for
Administering Section 504 and
Part B of EHA

I. Introduction

Presently, a multiplicity of offices and individuals are responsible (to varying degrees) for administering Section 504 and Part B of EHA. The first section of this part identifies the federal, state, and local agencies responsible for administering the two laws. The second section describes the general attempt to improve coordination. The final section sets out our findings, conclusions, and recommendations for improving coordination among the agencies. The final section of the paper also identifies the "pros" and "cons" of focusing all responsibility for policy development, compliance, and enforcement in one office within the new Education Department.

II. Administration of Section 504 Under Current Law

A. Federal Level Administration

OCR has primary responsibility for administering Section 504.^{32/} OCR is headed by a Director who is directly responsible to the Secretary. Under the Director is the Principal Deputy Director. The major offices within OCR (headquarters) include: the Office of Public Affairs, the Office of Inter-governmental Affairs, the Office of Deputy Director for Compliance and Enforcement, Office of Deputy Director for Program Review and Assistance, Office of Deputy Director for Standards, Policy, and Research, and the Office of Deputy Director for Management and Administration.^{33/} OCR has established ten regional offices responsible for

^{32/} In addition to administering Section 504, OCR's other primary responsibilities include Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

^{33/} Statement of Organization, Functions, and Delegation of Authority, 43 FR 40927 (September 13, 1978).

conducting most of OCR's day-to-day compliance activities. Within each regional office, separate divisions have been established for, among other things: elementary and secondary programs, postsecondary programs, and health and human development programs. Within each division, equal opportunity specialists (EOSs) under the supervision of managers, conduct the actual compliance activities. Each EOS is knowledgeable with respect to Section 504, Title VI, and Title IX.

OCR is provided legal support from the Civil Rights Division of the Office of General Counsel (OGC/CR). OGC/CR attorneys are located in Washington, D.C. and the ten regions.

When Mr. Califano was Secretary of HEW he initiated a policy that made civil rights an essential and integral part of every program in the Department. In accordance with this initiative, OCR entered into a memorandum of understanding with each program operating component (POC) (e.g., the Office of Education) in the department. In general, the memorandum of understanding with the Office of Education provides that the Education Division has the responsibility to seek and select program policies and procedures that can assist in achieving affirmatively the objectives of Title VI, Title IX, and Section 504.^{34/} The purpose of the activities undertaken by the Education Division is to help prevent discrimination before it occurs and to further recipient compliance with the civil rights authorities prior to the initiation of formal review or complaint investigation by OCR.^{35/}

^{34/} Memorandum of Understanding between the Office for Civil Rights and the Education Division (July 27, 1979) at p. 1.

^{35/} Id.

In addition to OCR (headquarters and regions), OGC/CR and the POCs, the Special Litigation Division and in some cases the Civil Rights Division in the Department of Justice are responsible for bringing court actions.

B. State Level Administration

In accordance with the terms of many grant programs administered by OE, the SEA is the recipient of the federal assistance. Its responsibilities include passing the assistance through to the agency actually providing the services (the subrecipient) and overseeing the operation of the assistance. The "oversight" must include compliance with Section 504. Under the Section 504 legal framework, SEAs may not adopt criteria or methods of administration that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap or provide significant assistance to any entity that is engaging in discrimination.^{36/} The SEA is responsible for designating a person within the agency as the "504 coordinator."^{37/}

C. Local Level Administration

The prohibition against adopting criteria or methods of administration that have discriminatory effects, the provision of significant assistance to an entity which discriminates, and the assignment of a "504 coordinator" apply to LEAs.

III. Administration of Part B of EHA Under Current Law

A. Federal Level Administration

The Bureau of Education for the Handicapped (BEH) has primary

^{36/} 45 C.F.R. §84.4(b)(1)(v) and §84.4(b)(4). Presently, the Title VI and Title IX regulations issued by HEW require that state agencies which "pass-through" federal aid to subrecipients develop written methods of administration. Presently, Section 504 does not require the development of a written plan, although a draft amendment to Section 504 requiring such a plan is presently working its way through the clearance process.

^{37/} 45 C.F.R. §84.7(a).

responsibility for administering Part B of EHA. In addition, it is responsible for administering Subpart 2 of Part B of Title I of ESEA (Programs for Handicapped Children Operated by State Agencies). Within BEH, the Division of Assistance to States oversees the day-to-day conduct of policy development and compliance and enforcement activities. The director of the division reports to the Associate Deputy Commissioner who in turn reports to the Deputy Commissioner. The Deputy Commissioner is accountable to the Commissioner of Education. Although there are 10 regional offices, they play little, if any, role in policy development, compliance and enforcement. Enforcement activities are conducted from Washington, D.C. BEH is provided legal assistance from the Education Division of the Office of the General Counsel.

In addition to BEH and OGC, three additional offices within the federal government have responsibility over Part B of EHA. The Office of the Inspector General within HEW is responsible for conducting program and fiscal audits under Part B of EHA and the Special Litigation and Civil Rights Division in the Department of Justice are responsible for litigation brought by the federal government under Part B of EHA.^{38/} The Civil Division of the Department of Justice is responsible for defending suits under Part B of EHA brought against HEW.

B. State Level Administration

SEAs are required under Part B of EHA to develop comprehensive procedures for ensuring that each handicapped child in the state receives a free appropriate public education in accordance with the provisions of Part B of EHA. The oversight procedures include: application approval,

^{38/} The Civil Rights Division may become involved in cases involving Title VI such as overrepresentation of minority children in separate programs for mentally retarded children.

monitoring, auditing, complaint resolution, and withholding.

C. Local Level Administration

LEAs and other agencies receiving assistance under Part B of EHA must adopt policies and procedures that ensure that the federal assistance is spent in accordance with the Part B of EHA requirements.

IV. Administrative Structure Under DEOA

In accordance with the provisions of the DEOA, the following administrative structure is established:

- o An Office for Civil Rights administered by an Assistant Secretary.^{39/} OCR's primary responsibilities include the administration of Section 504, Title VI, and Title IX.^{40/}
- o An Office of Special Education and Rehabilitative Services administered by an Assistant Secretary.^{41/} The office's responsibilities include, among other things, administration of Part B of EHA.^{42/}
- o An Office of General Counsel administered by the General Counsel.^{43/} OGC's responsibility with respect to Part B of EHA is not affected by DEOA. However, the specific responsibilities with respect to Section 504 (and Title VI and Title IX) are uncertain in light of Section 203(c)(3) of DEOA, which authorizes the Assistant Secretary for Civil Rights to hire his/her own attorneys.^{44/}

^{39/} Section 203 of DEOA.

^{40/} Id. An analysis of the legal responsibilities of the Secretary and the Assistant Secretary for Civil Rights for enforcement and compliance activities under DEOA is being prepared by Jeffrey M. Miller, Director Legal Services.

^{41/} Section 207 of DEOA.

^{42/} Id.

^{43/} Section 211 of DEOA.

^{44/} The role of OGC in light of Section 203(c)(3) is also the subject of the paper referred to supra. in footnote 40 and a paper prepared by William Taylor entitled "Analysis of Civil Rights Provisions of the Department of Education Organization Act."

- o An Office of Inspector General, administered by the Inspector General.^{45/} The Inspector General's responsibilities include, among other things, the auditing of grantees receiving assistance under Part B of EHA.

Secretary Hufstedler must decide whether to continue Califano's initiative to involve POCs in the administration of civil rights laws under OCR's jurisdiction. The responsibilities of the Special Litigation and Civil Rights Divisions and the Civil Division at the Justice Department are not affected by the DEOA.

In addition to coordinating enforcement efforts among the offices within the new Education Department and the Special Litigation Civil Rights, and Civil divisions in Justice, once the new department has been established, it will be necessary to coordinate enforcement efforts with the Department of Health and Human Services, especially with respect to State agencies and schools, such as departments of mental health and welfare and state schools for deaf and blind children that receive assistance under Part B of EHA and assistance under programs administered by the Department of Health and Human Services.^{46/} In addition, it will be necessary to coordinate efforts with what is presently referred to as the Rehabilitation Services Administration.

^{45/} Section 212 of DEOA.

^{46/} For a discussion of the potential problems of coordination between the Education Department and the Department of Health and Human Services, see a memorandum prepared by John F. Bean and Samuel C. Fish entitled "Coordination of Enforcement Activities Affecting Handicapped Individuals" (March 10, 1980).

V. HEW Attempts to Improve Coordination

Attempts to improve coordination in the administration of Section 504 and Part B of EHA between OCR and BEH were first initiated in 1976.^{47/} In a memorandum to the Secretary signed jointly by the Director of the Office for Civil Rights and the Commissioner of Education, attempts were made to assign 40 positions to BEH. The BEH staff would, among other things, assist in conducting investigations, provide technical assistance and guidance to LEAs and SEAs in pre and post investigative situations, and provide inservice training to LEA and SEA staff. No action on this request was taken. A similar request, this time for 26 positions, was made by the Commissioner in 1977.^{48/} Once again no action was taken.

In 1978, the Deputy Commissioner, Education of the Handicapped, wrote a memorandum to the Director of OCR suggesting BEH/OCR collaborative efforts in the implementation of Section 504 and Part B of EHA.^{49/} The memorandum expressed the need to expand collaborative efforts in order to ensure consistency between agencies. Some of the areas of collaboration suggested were: policy development, complaint information, and complaint resolution.

^{47/} See a memorandum from the Director of OCR and the Commissioner of Education to the Secretary entitled "Request for 40 Positions to be Assigned to OE" (September 13, 1976).

^{48/} See a memorandum from the Commissioner thru the Director of OCR to the Secretary entitled "Request for 26 Positions to be Assigned to OE (OCR Supplementary Request).

^{49/} Memorandum from Deputy Commissioner, Education of the Handicapped to David S. Tatel, Director Office for Civil Rights, entitled "BEH/OCR Collaborative Efforts in the Implementation of Section 504 and P.L. 94-142." (March 28, 1978).

The Director of OCR agreed with BEH and recommended, among other things, that both agencies designate persons in Washington and in the regions who would implement coordination efforts.^{50/}

In a memorandum of understanding, it was agreed that BEH and OCR would develop a joint BEH/OCR cooperative enforcement plan for administering requirements common to Section 504 and Part B of EHA.^{51/}

At present, a draft memorandum of understanding setting forth a joint BEH/OCR cooperative program is circulating within HEW (draft MOU). In general, the draft recognizes the need for OCR and BEH to work closely together on a regular basis so that the administration of requirements common to both laws will proceed in a consistent and coordinated manner. The draft MOU provides for, among other things, the establishment of an OCR/BEH Inter-agency Coordination Task Force.

The OCR Task Force members would include, but not be limited to:

1. Chief, Division of Elementary and Secondary Education Office of Compliance and Enforcement (OCE);
2. Chief, Handicap Discrimination Branch Office of Standards, Policy and Research (OSP&R);
3. Chief, Data Collection and Analysis Branch OSP&R;
4. Chief, Education Branch Office of Program Review and Assistance (OPRA); and
5. Special Advisor on Section 504 to the Deputy Director OPRA.

^{50/}Memorandum from Director, OCR to Edwin W. Martin, Deputy Commissioner, Education of the Handicapped entitled "BEH/OCR Collaborative Efforts in the Implementation of Section 504 and P.L. 94-142 (August 28, 1978).

^{51/}Memorandum from the Director, OCR to the Secretary entitled "Memorandum of Understanding and Civil Rights Work Plan for the Education Division" (July 25, 1979).

The BEH members would include, but not be limited to:

1. Chief, State Policy and Administrative Review Branch;
2. Chief, Program Support Branch; and
3. Chief, Field Services Branch.

The task force would make the initial attempts to resolve any problems resulting from the MOU. The task force would meet quarterly, or more frequently if necessary, to discuss any such problems. Task force members would exchange information on major programmatic activities (i.e., conferences, training sessions, information development and dissemination) to avoid duplication and inconsistency.

Notwithstanding the absence of a formal MOU (and the reality that such a MOU will probably not be forthcoming given the imminent establishment of the new department), several persons from BEH and OCR have been meeting informally on a regular basis. The meetings occur over breakfast and no formal agreements control the topics of discussion.

Coordination in the regions is also occurring on an informal basis with BEH and OCR in some regions working closely together and little, if any, coordination occurring in other regions.

VI. Findings, Conclusions, and Recommendations

A. Findings and Conclusions

The major findings and conclusions regarding the effects a multiplicity of agencies have on coordinating the administration of Section 504 and Part B of EHA are set out below. It should be noted that these findings and conclusions are general in nature; specific findings regarding policy development are set out in part four and specific findings regarding compliance and enforcement are set out in part five.

First, any coordination strategy must balance the objective of

making expeditious decisions with the objective of ensuring well-reasoned, consistent, and uniform decisions. One means of expediting a decision is to assign to the task force one (rather than multiple representatives) from each office and ensure that the person so assigned has been delegated the authority to act on behalf of the office he/she represents. One means of ensuring that the decision is uniform and consistent is to ensure that representatives from each of the offices or agencies responsible for administering the decision are involved in reaching the decision.

We conclude that the recommendation in the draft MOU that an Inter-agency Task Force be established is conceptually sound. We propose two changes. In the first place, the Task Force includes too many representatives from BEH and OCR. Furthermore, it does not make any provision for participation by such offices as OGC, the Inspector General, the Justice Department, and the Department of Health and Human Services (where such participation is required).

Second, the extensive amount of work which will be performed by the Task Force, when coupled with the gravity of the negative effect of lack of coordination, require the selection of participants from each office who are not already overwhelmed with other responsibilities.

Third, irrespective of the specific mechanism for coordination eventually selected, the ultimate success or failure of the endeavor will most likely depend on the ability of the participants to work together as a group. The present level of distrust and lack of confidence expressed by some (not all) representatives of OCR about BEH and vice versa will inhibit the accomplishment of any institutional strategy involving representatives from each agency.^{52/}

^{52/} See infra. at page 37.

Fourth, it is inevitable that irreconcilable differences among group members will occur. Thus, it is imperative that a mechanism be established for resolving conflicts. The draft MOU does not provide for a conflict resolution mechanism.

Finally, any attempt at coordination will ultimately fail if the decisions reached by the Task Force (or any equivalent) are not adequately communicated to the multiplicity of persons, branches, divisions, offices, and departments at the federal, state, and local levels affected by the decision.^{53/}

B. Recommendations

We recommend that an Inter-office Task Force be established for coordinating the administration of Section 504 and Part B of EHA. The Task Force should be composed of one representative from BEH, OCR, OGC (responsible for interpreting Part B of EHA), an attorney within OCR responsible for Section 504, and where necessary representatives from the Department of Justice, other offices within the Education Department, the Office of Inspector General, and the Department of Health and Human Services.

The person representing each office must be delegated the authority to act on behalf of the agency he/she represents. If a person on the Task Force is of the opinion that the decision is too important to be made without input from the Assistant Secretary, such input must be obtained and a second meeting scheduled.

Any disputes between participants on the Task Force must be resolved at a meeting attended by the Assistant Secretaries and their equivalents. Disputes between Assistant Secretaries must be resolved by the

^{53/} The system for communicating decisions reached by the task force is discussed infra. In general, we recommend the development of a reference service and policy manual.

Under Secretary.

Final decisions reached between the parties must be "signed-off" by all parties involved in the decision.

C. Establishment of a Single Office With Responsibility for Developing Policy and Compliance and Enforcement Under Section 504 and Part B of EHA: The Pros and Cons

Several persons have suggested that the best and in fact only effective solution for coordinating policy development and compliance and enforcement activities is to delegate all responsibility for policy and compliance and enforcement to a single office. One OCR staff person explained:

Effective and coordinated enforcement of EHA and Section 504 is critical. We conclude that effective coordination of EHA and Section 504 interpretation and enforcement on the national level can not be achieved as long as two separate operating components continue to have separate but overlapping responsibilities.

As presently constituted, both BEH and OCR independently receive and investigate individual complaints, initiate compliance reviews, achieve remedial actions, and provide for enforcement proceedings. Because there is overlapping jurisdiction, the opportunity exists for both OCR and BEH to be investigating the same recipient with different conclusions being reached. It is this major problem that the MOU attempts to resolve. We propose, however, that unless the inherent problem associated with two separate enforcement structures is addressed, no amount of good intentions regarding coordination can effectively remedy the problems associated with dual enforcement.

The attempt to coordinate efforts, although essential to ensure consistent efforts between OCR and BEH, will be costly and timely. OCR is under severe time restrictions imposed by the Adams court. Additionally, we are also concerned about expediting relief for complainants who may suffer irreparable emotional and educational damage by delays in administrative action. Under the MOU, timely delays are inevitable....

We, therefore, fear that valuable time may be spent reconciling differences between inter-office positions which could be avoided by a change in the dual system structure. Specifically, we recommend that a model based on OCR's relationship to the Office of Education regarding the management of the Emergency School Aid Act (ESAA) be adopted. This model would, by its very nature, afford maximum coordination of the two Department Regulations and provide HEW a more effective way to protect the rights of handicapped children in education.

A second OCR staff person stated that BEH is not effecting any meaningful compliance under Part B of EHA and therefore OCR should be delegated such responsibility. In addition, this person suggested that in order to address the present deficiency within OCR regarding the lack of educators on staff, persons within the Division of Assistance to States within BEH responsible for policy and compliance should be transferred to OCR. The responsibilities of "BEH" in the new department should be limited to dispensing funds (after OCR has approved the state plan), developing model programs, providing funds for teacher training, etc.

BEH staff persons strongly disagreed with the notion that they were not effecting compliance. They cite as examples: (1) the intervention in a case involving Puerto Rico where they had to "convince" OCR not to accept an inadequate remedial plan and (2) their recent dealings with California and the approval of their state plan.

More importantly, BEH contends that there is more than one strategy for effecting compliance. BEH is staffed primarily by educators and administrators and for that reason the state and local people are amenable to their "suggestions" (which are really demands). In other words, BEH pursues a more technical assistance orientation towards compliance than OCR; OCR takes a more prosecutorial approach. Some BEH

staff persons contend that their approach is at least as effective in the long run, as OCR's approach.

One state official's perception of BEH and OCR is consistent with the BEH staff person's opinion reflected above.

[My State] enjoys a good relationship with BEH through mutual respect and a common commitment towards the needs of handicapped learners. We have been able to work out administrative and procedural problems which surfaced early in the implementation of P.L. 94-142 and its relationship to existing state law.

In contrast, we have viewed the efforts of OCR to be that of prosecutor irrespective of the legitimacy or basis for a complaint... The perceived harassment of school officials from OCR has impeded the efforts of the SEA in developing the spirit of implementation of P.L. 94-142 and Section 504. This is unfortunate....

In addition to the comments set out above, several points must be considered in analyzing the efficiency of having a single agency assume all policy and compliance and enforcement responsibilities under Section 504 and Part B of EHA.

First, the authority under the DEOA to delegate all responsibilities for administering Section 504 and Part B of EHA to a single office is highly suspect. There are several draft and completed memoranda circulating within the department on the issue of delegation.^{54/}

Second, the political "fall-out" of such a recommendation must be considered. Other than certain OCR staff persons interviewed, few persons supported the suggestion.

^{54/} See supra. notes 40 and 44.

Developing, Issuing, Compiling and
Disseminating Policy

I. Introduction

The purpose of this part of the paper is to analyze the present policies and procedures within HEW for developing, issuing, compiling, and disseminating policy.

The first section of this part analyzes the procedures for developing and issuing policy under Section 504 and Part B of EHA. The second section analyzes the procedures for compiling and disseminating policy. The major recommendation is that the new department develop and distribute, free of charge, a reference service that brings together in one document all policy interpretations under Section 504 and Part B of EHA and that manuals integrating the various policies be developed and updated on a periodic basis.

II. Development and Issuance of Policy

A. Introduction

This section of the paper is divided into six subsections. The first subsection is the introduction. The second subsection defines the term "policy" for purposes of the paper. The third subsection describes and analyzes the legal constraints governing the development and issuance of policy under Section 504 and Part B of EHA and the administrative structure and procedures currently in effect. The fourth subsection describes the present procedures for coordinating policy development. The fifth subsection describes the current proposals for improving coordination. The final subsection contains findings, conclusions, and recommendations.

B. The Meaning of the Term "Policy"

For purposes of this paper, the term "policy" includes legislative rules, interpretative rules, and adjudicative rules.

"Legislative rules" are rules issued by an agency in accordance with statutory authority which implement the statute.^{55/} Legislative rules are contained in officially promulgated regulations which are originally published in the Federal Register as a "Notice of Proposed Rulemaking", republished in the Federal Register as final regulations (subject, in the case of certain regulations issued by the Education Department, to Congressional review), and finally codified in the Code of Federal Regulations. Legislative rules are considered to have the "full force and effect of law."^{56/} This means that a requirement issued as a regulation is as legally binding as a federal statute -- so long as it is consistent with the statute and is within the scope of the agency's delegated power.

An "interpretative rule" is defined as a rule or statement issued by an agency to advise the public of the agency's practical interpretation of the statutes and rules that it administers.^{57/} Interpretative rules are set forth in various formats. Some interpretative rules are published in the Federal Register.^{58/} Other interpretative rules, which are not

^{55/} Kenneth Culp Davis, Administrative Law Text (St. Paul, Minn.: West Pub. Co. 1972), p. 126.

^{56/} See Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942).

^{57/} Kenneth Culp Davis, Administrative Law Text (St. Paul, Minn.: West Pub. Co. 1972), at p. 126.

^{58/} It should be noted that Section 431 of GEPA, which sets out the procedures applicable to the issuance of regulations implementing, among other things, grant programs administered by OE, does not distinguish between legislative and interpretative rules. Under Section 431, the term regulation is defined to include "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication of a regulation, in the Federal Register, must transmit to Congress a copy of the regulation, which will generally become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

published in the Federal Register, appear in guidelines, directives, memoranda, handbooks, manuals, and correspondences. Certain of these documents are widely disseminated; others are simply sent to one party.

Faced with questions concerning the legality of agency pronouncements not published in the Federal Register containing mandatory language, the courts have generally concluded that the requirements are binding on agencies with actual notice of them.^{59/}

Courts unwilling to accord policy pronouncements unpublished in the Federal Register an equal status with officially promulgated regulations, often find them binding on agencies through the practice and policy of judicial deference to agency interpretations.^{60/}

Pronouncements containing acceptable courses of conduct which will satisfy a legal requirement have the legal effect of protecting the agency against adverse actions (such as audit exceptions) if the recommended course of conduct is followed. This assumes that the statements contained in

^{59/} 5 U.S.C. 552(a); See e.g., Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1970); Wheeler v. Barrera, 417 U.S. 402 (1974); King v. Smith, 392 U.S. 309 (1968).

^{60/} Courts have explained that agency interpretations are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945). In Skidmore v. Swift and Co., 323 U.S. 134, 138 (1944) the Supreme Court explained that the interpretations by the federal agency, while not controlling on courts by reason of their authority, constitute a body of experience and informed judgment to which courts and litigants may resort for guidance. The weight of such a judgment will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all other factors which give it power to persuade.

the pronouncements are not inconsistent with the statute or regulation.^{61/}

"Adjudicative rules" are applications of legislative and interpretative rules to a particular set of facts developed through investigations.

Adjudicative rules initially appear in enforcement documents, such as auditing reports, monitoring reports, letters of findings, as well as administrative decisions to withhold and terminate funds. Sometimes the decisions are compiled and then published in the Federal Register or in handbooks or digests.

Adjudicatory rules will be upheld if they are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.^{62/}

C. Legal and Administrative Frameworks

1. Legal and Administrative Frameworks Under Section 504

a. The Legal Framework -- The issuance of legislative rules under Section 504 is governed by Section 553 of the Administrative Procedures Act (APA) which generally provides for the publication of a "Notice of Proposed Rulemaking" in the Federal Register, opportunity for comments, and republication of final regulations. In addition, legislative rules must be issued in accordance with the guidelines set out in Executive Order No. 12044 ("Improving Government Regulations").^{63/} Under DEOA, Section 504 regulations

^{61/} Courts have explained that agency interpretations may be disregarded particularly where they are at variance with their own regulations and the clear language of the statute. See e.g., Frances v. Davidson, 340 F. Supp. 351, 365-66 (D.C. Md.), aff'd 409 U.S. 904 (1972); Stork v. U.S. 278 F. Supp. 869, 871 (D.C. Col. 1967); aff'd 430 F.2d 1104 (1967). United States v. Brady, 385 F. Supp. 1347, 1351 (S.D. Fla. 1974) explains: "when the government seeks to ... protect a public interest it is acting in its sovereign capacity and cannot be disabled by past actions of its officers or agents."

^{62/} See e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

^{63/} 43 FR 12661 (March 23, 1978).

must continue to be published in accordance with Section 553 of the APA.^{64/}

Under Section 553 of the APA, interpretative rules are exempt from the procedures applicable to legislative rules.

The publication of policies of general applicability is governed by Section 552 of the APA. In accordance with Section 552 of the APA, each agency must separately state and currently publish in the Federal Register substantive rules of general applicability and statements of general policy or interpretations of general applicability formulated and adopted by the agency.^{65/}

It is OCR's official policy to publish all major "policy determinations" in the Federal Register.^{66/} Policy determinations fall into one of three categories.

- (1) Policy Interpretations clarify and explain regulatory provisions.^{67/}
- (2) Procedural Announcements outline the specific procedures recipients must follow to comply with regulatory provisions or the procedures the office will follow to obtain compliance.^{68/}
- (3) Decision Announcements illustrate how the office has applied regulatory provisions to specific fact patterns developed through investigations.^{69/}

^{64/} Section 414 of DEOA. Section 414(b) provides that programs issued under, among other things, the Rehabilitation Act of 1973 are subject to the provisions of Section 431 of GEPA in lieu of Section 553 of the APA. Since Section 504 is not a "program", it is not subject to Section 431.

^{65/} Section 552(a)(1)(D) of the APA.

^{66/} 43 FR 18630 (May 1, 1978).

^{67/} Id.

^{68/} Id.

^{69/} Id.

In addition to the policies which are supposed to be published in the Federal Register, interpretations concerning Section 504 are contained in correspondences, memoranda prepared by OCR staff, digests, memoranda prepared by OGC staff, briefs filed by OGC and the Justice Department, and letters of findings.

b. The Administrative Framework -- The present administrative structure governing the development and issuance of policies is as follows. First, interpretative rules are developed by numerous divisions within OCR, including the Office of Standards, Policy, and Research, the Office of Public Affairs, the Office Intergovernmental Affairs, the Office of Program Review and Assistance. Theoretically, all interpretative rules are cleared through the Handicapped Discrimination Branch of the Office of Standards, Policy and Research before they are cleared. In addition adjudicative rules are also cleared through the Handicapped Discrimination Branch. At present the Branch consists of a branch chief, an attorney, and an EOS specialist.

Policies which are to be published in the Federal Register (i.e., policy interpretations, procedural announcements, and decision announcements) go through an extensive clearance process, which includes, but is not limited to, a review by the Branch Chief, Handicapped Discrimination Branch, the deputy to the Deputy Director of the Office of Standards, the deputies of the other offices within OCR, the Regional Directors, the Chief Deputy of OCR, the Civil Rights Division of the Office of the General Counsel, and the Director of OCR. Once it clears the Director it then goes to the various program operating components within HEW who may have some interest, the undersecretary, the Office for the General Counsel, and finally the Secretary.

Under this structure, in the last two and one-half years, two Section 504 policy interpretations concerning elementary and secondary programs have been published in the Federal Register.^{70/} No procedural announcements and no decision announcements have been published.^{71/}

2. Legal and Administrative Frameworks Under Part B of EHA

a. Legal Framework -- Legislative rules promulgated under Part B of EHA are not subject to the provisions of Section 553 of the APA because of the express exemption from such coverage for grant-in-aid programs.^{72/} Regulations issued under Part B of EHA are subject to the provisions of Section 431 of GEPA.^{73/}

The most important requirements set forth in the GEPA statute are: (a) The term "regulation" means: rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Secretary;^{74/} (b) each regulation must include "citations to the section or sections of statutory law or other legal authority upon which such provision(s) (are based);"^{75/} (c) all regulations must first be published in the Federal Register as proposed regulations;^{76/}

^{70/} Policy Interpretation No. 5 (Participation of Handicapped Students In Contact Sports) and Policy Interpretation No. 6 (School Board Members as Hearing Officers) 43 FR 36035-36 (August 14, 1978).

^{71/} It should be noted that the Office of Standards, Policy, and Research within OCR has put together a digest of significant case-related memoranda, which has not been published in the Federal Register. The digest is discussed in the next subsection of the paper.

^{72/} Section 553(a)(2) of the APA.

^{73/} Section 414(b) of DEOA.

^{74/} Section 431(a)(1) of GEPA.

^{75/} Section 431(a)(2) of GEPA.

^{76/} Section 431(b)(1) of GEPA.

(d) during the 30-day period following this publication, the Commissioner must offer interested persons an opportunity to comment upon the "proposed regulation";^{77/} (e) if the agency decides to adopt a regulation as final, it must republish the regulation in the Federal Register;^{78/} (f) all final regulations must be uniformly applied and enforced throughout the fifty states;^{79/} and (g) concurrent with the publication of any "final regulation" in the Federal Register, the Commissioner must transmit a copy of such to Congress. "Final regulations" will "become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the (final regulation) is inconsistent with the Act from which it derives its authority...."^{80/}

Publication of policy of general applicability is subject to Section 552 of the APA. The applicable standards are described supra. at page 43.

BEH has not published a formal procedure specifying when policies will be published in the Federal Register. Based on interviews at BEH, only "earth-shaking" policies are published in the Federal Register. Policies not published in the Federal Register are set out in DAS Bulletins, correspondences, monitoring reports, memoranda concerning the approval of state plans, OGC memoranda, and briefs prepared by OGC and the Department of Justice. DAS Bulletins are disseminated to SEAs as are certain letters.

^{77/} Section 431(b)(2)(A) of GEPA.

^{78/} Section 431(d)(1) of GEPA.

^{79/} Section 431(c) of GEPA.

^{80/} Section 431(d)(1) of GEPA. Failure on the part of Congress to act within the 45-day period is not to be construed as an approval or a finding of consistency with the Act for purposes of any judicial proceeding. Id.

b. The Administrative Framework -- BEH's administrative structure governing the development of policy under Part B of EHA is substantially simpler than OCR's structure. The policy section in the Division of Assistance to States is responsible for the development of all policy. Policy developed by the policy section is cleared with the Director of the Division and, when deemed necessary, by the Associate Deputy Commissioner and Deputy Commissioner. Policy for publication in the Federal Register is also cleared through the Commissioner of Education. Despite the "simpler" system employed by BEH, in approximately two and one-half years no policies have been published in the Federal Register.

D. Present Procedures for Coordinating Policy Development and Issuance

At present, coordination in the development of policies under Section 504 and Part B of EHA is handled informally. The basic strategy is for representatives of BEH and OCR to meet once a week over breakfast to discuss issues of mutual concern and exchange information. Otherwise, communication between the staffs of the two offices proceeds on an ad hoc basis. Interviews with OCR regional directors indicate that coordination does exist in some regions with respect to transmitting complaints and reports.

E. Proposals for Improving the Coordination Between BEH and OCR

A draft memorandum of understanding regarding the coordination of policy development under Section 504 and Part B of EHA is presently circulating within HEW. The applicable sections of the draft are set out below.

A. Whenever the Office for Civil Rights is developing formal policy interpretations (for publication in the Federal Register), the Branch Chief of the Handicap Discrimination Branch in the Division of Standards, Policy and Research will forward copies of the proposed policies to the Branch Chief of the State Policy and Administrative Review Branch in the Bureau of Education for the Handicapped for comment. The policy will be

forwarded to BEH at the time that it is submitted to the OCR Division Director. This will permit BEH a reasonable opportunity to comment before the policy is forwarded to the Director of OCR for clearance. This practice is separate from the Office of Education's formal clearance procedure, which occurs after the clearance of the OCR Director and is conducted by the Department's Executive Secretary. The Handicapped Discrimination Branch may contact BEH at an earlier time in the development of policy on controversial, novel, or precedent-setting matters.

B. Whenever the Bureau of Education for the Handicapped is developing formal policy issuances, the Branch Chief of the State Policy and Administrative Review Branch will forward copies of the draft policy statements to the Branch Chief of the Handicap Discrimination Branch in OCR for comment. It is understood that OCR will have a reasonable time to comment before the policy statement is sent to the Deputy Commissioner for clearance. It is also understood that, at the end of this period, the policy issuance will move forward to the Deputy Commissioner, even if OCR has not commented.

C. The Branch Chief of the Handicap Discrimination Branch and the Chief of the State Policy and Administrative Review Branch will try to informally resolve all policy issues. For example, when the Handicap Discrimination Branch is reviewing letters of findings (LOFs) developed by OCR regional offices resulting from a complaint or compliance review and these LOFs raise issues that are novel, precedent-setting, or controversial, the Branch Chief of the Handicap Discrimination Branch will telephone or meet with the Branch Chief of the State Policy and Administrative Review Branch to discuss the policy issue in question. If the Branch Chiefs are unable to resolve the issue informally, they shall convene a meeting of representatives from the Office for Civil Rights, the Bureau of Education for the Handicapped, and the Office of the General Counsel to discuss the matter in greater specificity. Similarly, when BEH is reviewing State plans or letters containing findings as a result of reviews or investigations of State education agencies and these letters raise issues that are novel, precedent-setting, or controversial, the Branch Chief of the State Policy and Administrative Review Branch will follow these same procedures and contact the Chief of the Handicap Discrimination Branch to discuss these issues.

D. Whenever the policy staff of either BEH or OCR deem an issue so significant that it merits a joint letter from the two agencies, either agency can request that a joint letter from the Director of OCR and the Deputy Commissioner for BEH be developed. The Branch Chiefs of the Handicap Discrimination Branch and the State Policy and Administrative Review Branch will be the points of contact for the development and clearance of any such letter.

F. Findings, Conclusions, and Recommendations

Set out below are our major findings, conclusions and recommendations regarding the development and issuance of policy under Section 504 and Part B of EHA.

First, the present system used by OCR and BEH for publishing policies in the Federal Register is clearly not working. In approximately two and one-half years, OCR has only published in the Federal Register two policy interpretations that are specifically applicable to elementary and secondary programs. In the same period, BEH has not published in the Federal Register a single policy interpretation. The failure to publish interpretations of Section 504 in the Federal Register appears to have resulted in large part from the desire of the Secretary of HEW to personally review each interpretation. Given the Secretary's other obligations, clearance of these interpretations assumed a very low priority. With respect to policies on Part B of EHA, BEH was also concerned with the clearance process once the policies left the Bureau and therefore used strategies which were more expeditious.

We recommend that the Secretary delegate the responsibility for signing-off on policy interpretations to the respective Assistant Secretaries, except in exceptional cases.

Second, the failure to publish the interpretations presently set out in DAS Bulletins and correspondence or indexes to such policies in the Federal Register is inconsistent with Section 552 of the APA.

Third, the lack of coordination between BEH and OCR has resulted in (a) some inconsistent policy pronouncements^{81/} and (b) on several occasions one agency expressing its position on a controversial issue when the other agency had not yet announced its official position.^{82/}

We generally concur with the proposal for improving coordination set out in the draft MOU. However, we conclude that the proposal will accomplish its objectives only if:

- (1) The person responsible for submitting his/her office's comments has been delegated the power to speak for his/her office. Otherwise, intolerable delays will occur and the other representatives will become frustrated and lose confidence in the arrangement.
- (2) The person responsible for submitting comments is not so overwhelmed with other responsibilities that he/she fails to submit comments on time or his/her comments are not well thought out. The tendency in the government is sometimes not to focus all of one's attention on an issue until it is absolutely necessary. Representatives responsible for submitting comments must treat their obligation as a top priority requiring a complete review.
- (3) The policy development branches of the respective offices are sufficiently staffed by competent high level persons so that they may carry out the multiple number of other task assignments they are expected to perform. For example, it is not surprising that the Handicapped Discrimination Branch in OCR has prepared as few policy interpretations as it has given the size of its staff (a branch chief, one attorney and an EOS) and the number of responsibilities, especially clearances of documents

^{81/} See for example the question of whether psychotherapy is a related service.

^{82/} For example, OCR has already explained that where catheterization need not be performed by a physician it is a "related service." BEH has not yet taken an official position although a draft policy has already been written. OCR has also taken a position on the need to provide year-round schooling for certain severely handicapped students. BEH has not as of yet taken an official position on this issue.

prepared by other agencies, offices, divisions, regional offices, and contractors it must carry out.

- (4) There is a commitment and capability of the representatives of the respective agencies to work together. An intangible such as a good working relationship often is of greater significance than official institutional decisions such as those set out in the draft MOU.
- (5) All agreements, not simply letters, which concern issues applicable to Section 504 and Part B of EHA, should contain signatures from both offices.
- (6) Where relevant, other offices (such as general counsel, the Office of the Inspector General, the Department of Health and Human Services and the Justice Department) must be involved in the clearance process.
- (7) A library or reference system must be established to assist the participants in determining whether similar issues have already been decided and for using rationales contained in earlier interpretations for developing new interpretations.^{83/} It is poor management to assume that the person who is presently responsible for policy will always be in that position. A person, no matter how much knowledge he/she has in his/her head, is of no use to the office once he/she leaves. The system must be in writing.

III. Compilation and Dissemination of Policy

A. Introduction

The previous section analyzed the procedures for developing and issuing policy. One of the major findings set out in the section and in part three of the paper is that numerous agencies and divisions within those agencies are writing policy and that the policy is contained in numerous documents including interpretations published in the Federal Register, letters sent out to individuals, digests, memoranda

^{83/} See infra., at p. 57.

and briefs prepared by OGC and the Justice Department, and internal memoranda prepared by BEH and OCR. In addition to policies prepared by the federal government, courts are beginning to hand down decisions under Section 504 and Part B of EHA.^{84/}

This section of the paper analyzes what OCR and BEH are going to compile, disseminate, and integrate the numerous policies contained in the documents described above.

The major finding is that no attempt has been made to develop a formal system whereby BEH and OCR policies are compiled, indexed and disseminated within the federal government and to grantees and beneficiaries. OCR recently initiated a system for digesting case-related memoranda. In addition, a comprehensive Section 504 manual was prepared under contract in 1979 for internal use.

The section is divided into six subsections. The first subsection is the introduction. The second subsection describes the general legal framework applicable to Section 504 and Part B of EHA. The third and fourth subsections describe the specific legal and administrative systems governing the compilation and dissemination of policy under Section 504 and Part B of EHA. The fifth subsection describes attempts to develop a system for integrating policies issued under both Section 504 and Part B of EHA. The final subsection includes findings, conclusions, and recommendations.

^{84/} See e.g., Armstrong v. Kline (year-round education); Stuart v. Nappi, (suspension and expulsion of handicapped children); and New Mexico Association of Retarded Citizens v. State of Mexico (failure by SEA to ensure and LEAs to provide a free appropriate public education to handicapped children, as required by Section 504).

B. The General Legal Framework Under Section 504 and Part B of EHA

In accordance with Section 552 of the APA, each agency (in accordance with published rules) must make available for public inspection and copying:

- (a) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (b) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
- (c) administrative staff manuals and instructions to staff that affect a member of the public unless the materials are promptly published and copies offered for sale.

Furthermore, each agency must make available for public inspection and copying (a) final opinions and orders made in the adjudication of cases, (b) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register and (c) administrative staff manuals and instructions to staff that affect a member of the public. Each agency must also maintain and make available for public inspection and copying current indexes, providing identifying information for the public as to any matters issued, adopted, or promulgated after July 4, 1967 made available or published. Each agency must promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency must nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or

cited as precedent by an agency against a party other than an agency only if:

(1) it has been indexed and either made available or published as provided by this paragraph; or

(2) the party has actual and timely notice of the terms thereof.

C. The Specific Legal and Administrative Framework Under Section 504

1. Legal Framework Under Section 504

In addition to the procedures set out in Section 552, OCR's official policy with respect to the dissemination of policy is as follows:

(OCR will) systematically provide copies [of policy interpretations, procedural announcements, and decision announcements] to organizations representing beneficiaries and recipients of federal financial assistance.^{85/}

2. Administrative Framework

At present there is no system within OCR for compiling and disseminating policy set out in letters, OGC memoranda, briefs filed by OGC and the Justice Department, and court cases. Recently, OCR initiated a procedure of summarizing significant case-related policy clarifications.^{86/} Last year a contractor prepared a handbook for OCR which integrates all of the policies under Section 504 contained in letters, LOFs, memoranda, briefs, and court cases issued as of December of 1978.^{87/} The handbook was

^{85/} 43 FR 18631 (May 1, 1978).

^{86/} The document is called a Digest of Significant Case-Related Memoranda Issued by the Office of Standards, Policy, and Research. To date ten summaries concern elementary and secondary education programs. A draft index to the digest is presently working its way through the clearance process.

^{87/} Silverstein, Kamil, et al. Handbook for the Implementation of Section 504 of the Rehabilitation Act of 1973 (CRC Education and Human Development, Inc. (February 1979)).

used to train OCR staff and representatives from selected representatives of the Program Operating Components within HEW. The handbook was not disseminated to recipients.

In short, notwithstanding the new digest, there is no comprehensive system for compiling and disseminating all policies to the regional offices in OCR or to recipients. The former Director of OCR expressed an urgent need for the development of a reference system which compiles and disseminates all policies issued by OCR. On April 27, 1978 the Director of OCR stated:

A major obstacle to effective civil rights enforcement by this Department has been the failure of past administrations to make and disseminate policy interpreting the laws we enforce.... Even where answers existed, they were most often given on a case-by-case basis, in response to complaints or inquiries -- a procedure that left many broader questions unanswered -- and because policy was articulated only in letters responding to individual inquiries, the very existence of these interpretations was, in effect hidden. The public -- indeed, some of our own employees -- did not know what OCR policy was, and the result was inconsistent applications of the interpretation.

In order to eliminate the obstacles referred to above, two procedures were initiated. The first was the publication in the Federal Register of policy interpretations, procedural announcements, and decision announcements. This policy was described in the previous section. Recall that under this new policy the Secretary has only signed off on two policy interpretations (two in almost two and a half years).

The second strategy for eliminating the obstacle was the development of an HEW civil rights reporter.

This compilation of all policy interpretations and guidelines will be logically organized, comprehensive, and cross-referenced. It will allow for periodic insertion of new policy decisions or modifications of existing policy. This new system will help increase understanding of our policy since it will be made available to the public, special interest groups, members of Congress, recipients of HEW assistance, and, of course, to those who benefit from enforcement of these important laws.

To date, there is no civil rights reporter system nor is there a viable plan to ensure the existence of one in the near future.

D. Legal and Administrative Framework Under Part B of EHA

There are no official pronouncements set out in the Federal Register describing the system BEH uses for compiling and disseminating policy. Based on interviews with BEH employees, it appears that the policy section of the Division of Assistance to States has compiled all BEH's pronouncements and OGC has a record of all cases decided and pending. However, these "systems" are not disseminated to OCR or to grantees.

E. Attempts to Develop a System for Compiling and Disseminating Policy

To date, no attempts have been made to develop a comprehensive system for compiling and disseminating policies under Section 504 and Part B of EHA. Thus, neither agency has ready access to each other's policy pronouncements.

F. Findings, Conclusions, and Recommendations

The federal government requires approximately 16,000 recipients of federal assistance operating elementary and secondary education programs to comply with two complex laws. Most recipients are more than willing to comply because they believe in the objectives of the laws.

Given the complexities of the laws, given recipients willingness to comply, and given the clarity of the Congressional mandates, it is inexcusable as well as a violation of Section 552 of the APA for the federal government to fail to provide ready access to the "rules of the game" for the recipients and beneficiaries of the programs.

- o How can the federal government, with the multiplicity of agencies and individuals involved in the administration of Section 504 and Part B of EHA, conceivably expect to effectively and efficiently pursue uniform and consistent compliance and enforcement without a reference system which enables persons to review what others have said in the past?
- o How can recipients be expected to provide quality services if they are spending an inordinate amount of time discovering the "rules of the game"?
- o How can beneficiaries of the program and their representatives ensure that their "rights" are not being abridged if they don't even know what their rights are?

We conclude that HEW has not and the new Education Department will not be able to function effectively, efficiently, consistently, and uniformly without a reference service. Furthermore, we conclude that recipient's level of frustration stemming from a failure to inform them of the "rules of the game" has and will have in the future the effect of bringing about a backlash against handicapped persons that may prove to be irreversible. Finally, we conclude that handicapped children and their representatives will vent their frustrations towards the Education Department, SEAs, and LEAs in counter productive ways.

We recommend the development of a reporter service by the new department. Furthermore, we recommend the periodic development of a policy manual that will synthesize the policies contained in the reporter service.

The Education Department should prepare and distribute the reporter service and manual free of charge, to the following persons and agencies:

- (1) Persons within the Education Department, the Justice Department, and the Department of Health and Human Services responsible for administering Section 504 and Part B of EHA to ensure that such persons uniformly interpret, apply, and enforce the applicable requirements throughout the United States;
- (2) Persons within state educational agencies to assist such persons in achieving proper and efficient administration of Section 504 and Part B of EHA.
- (3) Persons within local educational agencies and other recipients operating programs for handicapped children to assist such persons in meeting applicable requirements and enhancing the quality, increasing the depth, or broadening the scope of activities for handicapped children; and
- (4) Persons representing or working on behalf of handicapped children to assist such persons to comprehend the nature and extent of their rights under the applicable laws.

The reporter service should include, with respect to Section 504 and Part B of EHA ^{88/}

- (1) policies set out in the Federal Register,
- (2) summaries of letters of findings (LOFs) issued by OCR, including summaries of proposed remedial action plans,
- (3) summaries of monitoring reports prepared by "BEH" and audit determinations,
- (4) updates of the status of LOFs, withholding actions, and audit determinations,

^{88/} The Education Department should give serious consideration to developing a single reference service for all civil rights statutes and grant programs for disadvantaged persons.

- (5) summaries of administrative decisions handed down by the reviewing authority and Secretary under the Title VI compliance and enforcement procedures and decisions handed down by the Hearing Panel and Education Appeals Board,
- (6) summaries of advisory opinions set out in correspondence,
- (7) summaries of cases in federal and state courts,
- (8) summaries of policy memoranda prepared by or for the various Assistant Secretaries and General Counsel,
- (9) descriptions of the cases filed for which a decision has not yet been rendered and an update of the status of the cases, and
- (10) summaries of positions taken by the Justice Department in briefs filed in relevant cases.

The reporter service should include a comprehensive index which should be updated monthly.

The policy manual should synthesize the "rules of the game" set out in the reference service as of a given point in time. The manual will provide a further assurance that the Equal Opportunity Specialists in OCR and the state monitors in "BEH" provide clear, consistent, and uniform interpretations. Furthermore, the existence of such a manual will further reduce the amount of time recipients spend figuring out the "rules of the game" and increase the amount of time spent on improving the quality of programs for handicapped children.

Enforcement

I. Introduction

In order to guarantee that SEAs and LEAs satisfy the requirements set forth in Section 504 and Part B of EHA, compliance and enforcement systems have been developed. The purpose of this part of the paper is to analyze the adequacy of the efforts by the federal government to pursue a coordinated program of enforcement regarding compliance with Section 504 and Part B of EHA.

This part of the paper is divided into three sections. The first section is the introduction. The second section analyzes the policies and procedures governing the initiation, investigation, and notification of findings of noncompliance. The third section analyzes the enforcement actions which may be taken to secure compliance and the procedures which must be followed when a particular action is used.

II. The Policies and Procedures Governing the Initiation, Investigation, and Notification of Noncompliance

A. Introduction

This section of the paper contains an introduction, describes the applicable legal and administrative frameworks, problems with the present frameworks, attempts to coordinate policies and procedures, and findings, conclusions, and recommendations.

1. The Framework Under Section 504^{89/}

^{89/} As explained supra., Section 505 of the Rehabilitation Act of 1973 requires that the Title VI rights, remedies, and procedures be used for enforcing Section 504. The Section 504 regulations issued by HEW presently incorporate by reference the Title VI procedures (see Subpart G). The Department of Justice has issued guidelines which agencies must follow in promulgating their own Title VI procedures. The guidelines control the initiation, investigation, and notification of findings. The Justice Department guidelines and HEW's procedures are set out infra. in footnote 110 and pages 74-79.

The Section 504 requirements apply to each recipient of federal financial assistance from the department and to each program or activity that receives or benefits from such assistance.^{90/} Thus, for example, an agency that does not receive assistance under Part B of EHA but which receives assistance under another federal program, such as Title I of ESEA, must still comply with Section 504. Any agency which receives assistance under Part B must, by definition, also satisfy the requirements of Section 504.

OCR, in enforcing Section 504, focuses its efforts primarily against recipient agencies operating programs (e.g., LEAs and special purpose school districts)^{91/} and secondarily against SEAs.^{92/} When OCR brings an action directly against an SEA, it is usually because it has found that a state policy is forcing LEAs to decide whether to comply with state law and violate Section 504 or vice versa.^{93/}

^{90/} 45 C.F.R. §84.2.

^{91/} The introductory phrases set forth in Subpart D generally apply only to an agency "operating" a program.

^{92/} OCR's standard operating procedure is to join an SEA as a party in an action against an LEA alleging that the SEA has failed to properly oversee the administration of programs operated by LEAs or has perpetuated discrimination against qualified handicapped persons by providing significant assistance to an agency which is engaging in discriminatory practices. However, this joinder is often simply a formality; little effort is usually directed at changing the SEA's administrative policies or practices. Recently, a district court found the State of New Mexico in violation of Section 504 for failing to properly oversee compliance by LEAs and perpetuating discrimination by providing significant assistance. New Mexico Association for Retarded Citizens v. State of New Mexico. This case was brought by private plaintiffs and not OCR. OCR is currently completing a comprehensive review of the New Mexico SEA.

^{93/} 45 C.F.R. 84.10 states that the existence of an inconsistent state law does not excuse an LEA from complying with Section 504.

OCR's failure to focus its enforcement efforts at the SEA level may stem, in part, from the lack of clarity and comprehensiveness of the legal requirements applicable to the SEA's oversight responsibilities.^{94/}

Compliance with Section 504 is carried out by OCR's ten regional offices. The offices conduct compliance reviews and investigate complaints. OCR is presently under a court order which controls the timetables for resolving complaints and issuing findings following compliance reviews.^{95/} The entire process for investigating alleged discrimination is subject to a comprehensive manual of procedures that includes such topics as: determining jurisdiction, completing a written plan for conducting the investigation, completing an investigative report, writing a letter of findings, negotiating a settlement, and making recommendations for pursuing formal administrative enforcement actions.^{96/} The manual identifies three areas where coordination with other agencies should be considered. First, under limited circumstances, OCR regional offices are directed to defer to other agencies with concurrent jurisdiction and comparable authority to remedy the violation within a 90-day period.^{97/} Second, the manual explains when copies of complaints filed with other agencies will also be considered a complaint for OCR purposes.^{98/} Third,

^{94/} Presently, the Title VI and Title IX regulations issued by HEW require that State agencies which pass through federal aid to subrecipients develop written "methods of administration". Presently, Section 504 does not require the development of such a plan, although a draft amendment to Section 504 requiring such a plan is presently making its way through the clearance process.

^{95/} Brown v. Weinberger, 417 F. Supp. 1215 (1976), Adams v. Richardson (D.C.D.C.), 356 F. Supp. 92 (1973) mod. 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973), Sub. nom. Adams v. Califano, 430 F. Supp. 118 (1977).

^{96/} DHEW/OCR Complaint Investigation Procedures (June 29, 1979).

^{97/} Section 2.6 of the Complaint Investigation Manual.

^{98/} Section 2.20 of the Complaint Investigation Manual.

the manual explains when copies of complete or completed complaint files should be sent to another federal agency such as EEOC or OFCCP in the interest of coordination. Under the above circumstances, OCR investigates the case in its normal sequence and shares information on its findings with the other agencies. Copies of LOF's are sent at the same time copies are sent to complainants and recipients.^{99/}

Investigative plans and proposed letters of findings (LOFs) go through several formal and informal review procedures. First, investigative plans and proposed LOFs are reviewed by OGC/CR for their legal sufficiency.^{100/} To minimize delays, OGC/CR attorneys often work directly with EOS throughout each stage in the investigative process. Second, summaries of proposed LOFs are automatically sent to headquarters in "Early Warning Reports". If headquarters staff of OCR conclude that LOFs raise important or novel policy issues or may be controversial, they call in the proposed LOFs for a closer review and clearance.

After LOFs have been cleared by headquarters, they are issued by the regional office. Copies are sent to the complainant and the respondent.^{101/}

The LOFs generally contain: (1) OCR's findings, (2) guidelines for fashioning a remedy (for LOFs finding noncompliance), (3) an explanation of the negotiation process, (4) an offer of technical assistance, and (5) a warning of possible release under the Freedom of Information Act.^{102/}

^{99/} Section 2.35 of the Complaint Investigation Manual.

^{100/} Section 3.4 and 7.3 of the Complaint Investigation Manual.

^{101/} Section 7.1 of the Complaint Investigation Manual.

^{102/} See Section 7.2 of the OCR Complaint Investigation Manual. 45 C.F.R. §84.6(a) provides that if the Director finds that a recipient has discriminated against persons on the basis of handicap... the recipient shall take such remedial action as the Director deems necessary to overcome the effects of discrimination.

Remedial action proposals may include such activities as the development of a remedial action plan, the provision of compensatory education, and the provision of services to persons who are no longer participants as well as to those who would have been participants, if not for the discrimination.^{103/}

2. The Framework Under Part B of EHA

The requirements set out in Part B of EHA and its implementing regulations apply to each state which receives payments under Part B of EHA.^{104/} The annual program plan is submitted by the SEA on behalf of the state as a whole, therefore, the requirements under Part B are binding on each public agency that has direct or delegated authority to provide special education and related services within a state receiving assistance under Part B, regardless of whether that agency is receiving funds under Part B.^{105/}

Although BEH's authority to initiate compliance activities is broad (see above), BEH places virtually all of its enforcement efforts at the SEA level. This is because the SEA is directly responsible for (1) ensuring that each handicapped child in the state receives a free appropriate public education, (2) developing comprehensive policies and procedures providing for such opportunities for handicapped children, and (3) establishing a comprehensive system of compliance and enforcement for overseeing the operation of programs for LEAs and other subgrantees.

The process used by BEH is twofold. The first strategy is to make a comprehensive review of each state's plan.^{106/}

^{103/} 45 C.F.R. §84.6(a); Section-by-section analysis, 42 FR 22687, col. 2 (May 4, 1977).

^{104/} 45 C.F.R. §121a.2(a).

^{105/} 45 C.F.R. §121a.2(b).

^{106/} For a description of the contents of a state plan see infra.

BEH has prepared a set of instruments and checklists for persons responsible for reviewing state plans. These instruments and checklists are designed to increase uniformity in review throughout the country.

Second, BEH conducts compliance reviews of each state once every other year. Persons conducting these reviews use uniform instruments prepared in Washington. Following an on-site visit, SEAs are sent a copy of the monitoring report and required to make changes within a specified date.

BEH does not have in place a complaint resolution procedure. Under Part B, SEAs are responsible for developing comprehensive complaint resolution procedures.^{107/}

The entire process for clearing proposed enforcement actions within BEH occurs at headquarters and involves several branches within the Division of Assistance to States and communication with the Associate Deputy Commissioner and the Deputy Commissioner.

B. Problems with the Present Framework

From the point of view of an SEA, once the federal government has approved the legal adequacy of its policies and procedures governing the administration of its education programs for handicapped children and completed an on-site review which further substantiates the adequacy of their policies and procedures under Part B of EHA, it is reasonable for that agency to expect that another office (OCR) within the same department will not find that the approved policies violate a provision in Section 504, which on its face is identical to a provision in Part B. SEAs argue that an enforcement approach that is inconsistent with such a principle would be untenable.

^{107/} 45 C.F.R. §121a.602.

However, states contend that the above scenario is occurring. For example, BEH approved a state plan containing due process procedural safeguards which OCR subsequently ruled to be violative of the standards in the Section 504 regulation.

C. Attempts to Coordinate the Initiation, Investigation, and Notification of Noncompliance

In addition to the informal breakfast meetings discussed supra., several regions have initiated informal lines of communication with their counterparts in BEH and vice versa. Some offices are sharing plans for future action, observing compliance reviews carried out by the other agency, and sending copies of LOFs and monitoring reports once they have been issued. The provisions of the draft memorandum of understanding pertaining to findings regarding compliance are set out below.

Complaints

OCR Complaint Data - The Director, Management Information Division in OCR will provide BEH a monthly report of Section 504 (Subpart D) complaints and any Title VI complaints involving the education of handicapped students (e.g., least restrictive environment problems in developing desegregation plans). The report will be given to the Chief of Administrative Review Section in BEH, and will show the following information by region: (1) name of agency, (2) name of complainant, (3) allegation (e.g., child placement, due process, etc.) (4) date complaint filed, and (5) status of case.

NOTE: A regional OCR Elementary and Secondary Education Division Director may need information or assistance from BEH when a complaint is initially filed (i.e., before the monthly report is issued). In such instances, the OCR regional staff member should make a direct call to his or her counterpart in BEH or to the designated OE regional staff member. If necessary, OCR will forward a copy of the full complaint to the BEH staff member or the OE regional staff member with whom the telephone contact was made. The same procedure is applicable to BEH.

BEH Complaint Data - BEH and/or the OE regional office will provide the regional OCR Elementary and Secondary Education Division Directors with monthly reports of P.L. 94-142 complaints. The reports will contain essentially the same information as that in Paragraph A, above. If a regional OCR staff member wants additional information about a particular case, he or she will contact the appropriate BEH staff member or the OE regional office staff member.

BEH Follow-Up on Data; Duplicate Complaints - If BEH or the OE regional office wants additional information about a particular case in the monthly report, a BEH complaint specialist or the State Plan Officer for the region will call the regional OCR Elementary and Secondary Education Division Director. BEH staff will also compare the OCR list with the existing BEH or OE regional complaint listing to determine if there are duplicates (e.g., same case or same agency). If there are duplications, BEH or OE regional staff will call the regional OCR Elementary and Secondary Education Division Director. Case-by-case determinations will be made in deciding: (1) whether there should be a joint investigation, (2) whether OCR or BEH should take the lead in conducting one overall investigation, or (3) whether each agency will conduct its own separate investigation. Correspondence to the complainant and to the recipient will indicate that both agencies are aware of, and involved in, the case.

OCR Letter of Findings - BEH Reports - The regional OCR Elementary and Secondary Education Division Director will send BEH a copy of each LOF at the time it is sent to the recipient. Whenever an on-site investigation is conducted by BEH, a copy of the report to the State education agency will be sent to the appropriate regional OCR Elementary and Secondary Education Division Director. Either agency may contact the appropriate officials in the other agency and submit LOFs and reports for review and comment prior to issuance to recipients and State education agencies.

Privacy Act - Both agencies will follow requirements of the Privacy Act with regard to the sharing of personally identifiable information.

Enforcement Activities - If OCR initiates formal enforcement action against a recipient, the Director, Elementary and Secondary Education Division, Office of Compliance and Enforcement, will inform the Chief, Administrative Review Section. The Chief, Administrative Review Section, will also inform the Director, Elementary and Secondary Education Division, Office of Compliance and Enforcement, if BEH initiates enforcement against a recipient.

COMPLIANCE REVIEWS

Lists of Projected Visits - Beginning with FY 1981, OCR's proposed Annual Operating Plan (AOP) will be sent to BEH at the time the AOP is published in the Federal Register for comment and when the AOP is published in final form. Additionally, a monthly report of on-site visits will be provided by the Director of the Data Management Division, OCR, to the Chief, Administrative Review Section, BEH. The Chief, Administrative Review Section will also send BEH's projected schedule of visits to each regional OCR Elementary and Secondary Education Division Director in August.

OCR Letter of Findings - The regional OCR Elementary and Secondary Education Division Director will send the Chief, Administrative Review Section of BEH a copy of each LOF at the time the letter is sent to the recipient. The regional OCR Elementary and Secondary Education Division Director may also want information or assistance from BEH at the time the LOF is being drafted. In such instances, the regional OCR Elementary and Secondary Education Division Director or designated staff should contact the Chief, Administrative Review Section. In addition, OCR Headquarters staff, in reviewing draft LOFs, may decide that BEH should be involved before the LOF is sent to the recipient (e.g., the letter deals with issues that are novel, precedent-setting, or controversial). In such instances, OCR Headquarters staff person should call the Chief, Administrative Review Section. Whenever BEH is contacted before a LOF is sent, BEH/OCR will make a joint determination about the nature/extent of BEH's involvement.

BEH Reports - The Chief, Fields Service Branch, will provide copies of its program administrative review site visit reports to the regional OCR Elementary and Secondary Education Division Director at the time the report is sent to the State education agency. If, in preparing the report

a question surfaces regarding compliance with or relationship to Section 504, BEH will: (1) call the regional OCR Elementary and Secondary Education Division Director--if the issue is routine, or (2) call the Chief, Handicap Discrimination Branch, OSP&R, if the issue is new, precedent-setting, or controversial.

Follow-Up (Monitoring/Verification Visits) - A determination will be made by the Chief, Administrative Review Section and the regional OCR Elementary and Secondary Education Division Director on a case-by-case basis regarding whether follow-up monitoring visits are to be made jointly by OCR and BEH.

D. Findings, Conclusions, and Recommendations

Set out below are our major findings, conclusions, and recommendations regarding the initiation, investigation, and notification of findings of noncompliance under Section 504 and Part B of EHA.

First, it is untenable for the federal government to require compliance with two complex laws and then give mixed signals regarding what constitutes compliance. We recommend that OCR "sign-off" on state plans regarding their compliance with Section 504. Such a policy will place SEAs on notice that their policies and procedures satisfy Section 504. This recommendation should be adopted only if OCR is provided sufficient resources to carry out this additional responsibility. Of course, OCR can bring a subsequent action against an SEA if (a) the policy does not violate Section 504 on its face but has a discriminatory effect, (b) if the SEA fails to administer its policies in accordance with its policies, (c) if the SEA changes its policy, or (d) the OCR staff person approves a state plan which, on its face, is inconsistent with the Section 504 regulation and policy interpretations published in the Federal Register. If subsequent to the approval of a plan, OCR changes its policy it must notify the state and provide it with a reasonable amount of time to come into compliance.

Second, the basic strategy for making findings of noncompliance under Section 504 and Part B of EHA is significantly different. Whereas OCR does its own investigations of complaints against LEAs operating programs, BEH relies on SEAs to conduct investigations at the local level. BEH's oversight efforts are directed, almost completely, at the SEA. At present there is very little, if any, coordination between OCR and SEAs regarding the investigation of complaints.

The difference in approach raises a basic question which the new Secretary of Education and Assistant Secretary for Civil Rights must address. The question is whether civil rights compliance and enforcement should: (a) be handled solely by the federal government, (b) primarily by the federal government, with minimal responsibility placed on SEAs, (c) shared responsibility with a clearer understanding of the SEA's obligations, (d) primary responsibility at the SEA level, or (e) sole responsibility at the SEA level with the federal government's responsibility limited to ensuring that the SEA performs its responsibilities.^{108/}

The choice among strategies will require a thorough analysis of such documents as: The DEOA, the Title VI guidelines issued by the Department of Justice (especially 28 C.F.R. §42.410), HEW Title VI compliance and enforcement regulations, which are incorporated by reference by the Section 504 regulations (consistent with Section 505 of the Rehabilitation Act of 1973, as amended), the Adams order, and complaint procedures set out in HEW/OCR's Complaint Investigation Procedures Manual.

The limitations of time and resources restrict our ability to make a recommendation regarding which alternative is most appropriate

^{108/} See a recent report analyzing the capacity of state agencies to assist OCR in overseeing compliance with laws it administers. The report is entitled "Finding the Common Denominator: The Capacity of State Agencies to Assist the HEW Office for Civil Rights (SRI International).

and why. We can however make recommendations regarding the present structure.

We recommend that OCR establish a procedure for coordinating the investigation of complaints under Section 504 and Part B of EHA with SEAs in matters pertaining to allegations against LEAs and other agencies operating programs for handicapped children.

In addition, we recommend that BEH provide increased technical assistance to SEAs regarding the investigation of complaints.

Further, we recommend that if OCR chooses to increase the SEA's responsibility regarding compliance and enforcement that it clarify the nature and extent of the SEA's responsibility under Section 504.

Our third finding is that the present system of coordination, which relies on periodic informal meetings over breakfast, is inadequate. Although some persons within BEH and OCR in Washington may know what the other agency is doing, there is no assurance that others in headquarters or in the regions are being informed. The proposal in the draft MOU is a significant improvement. However, we find that there are certain provisions which should be changed.

- (a) The proposed contents of the monthly report are insufficient. The report must include a brief statement of the facts and a statement of the issue (if and when such statements are possible).
- (b) The draft MOU gives the impression that BEH has its own procedure for investigating complaints, even though no such procedure presently exists. If BEH is agreeing to obtain descriptions of complaints from the SEAs, this point should be clarified.
- (c) The procedures concerning OCR deferral to BEH are unclear, especially in light of the Adams order.

- (d) The draft MOU does not address the problem of joint administrative actions against a non-compliant recipient following an investigation.^{109/}

III. Administrative Actions and Procedures for Securing Compliance

A. Introduction

The previous section of the paper analyzed the procedures for initiating, investigating, and notifying recipients of findings of non-compliance. The purpose of this section of the paper is to analyze the administrative actions and procedures for securing compliance with Section 504 and Part B of EHA.

The section is divided into six subsections. The first subsection is the introduction. The second subsection describes the present legal system prescribing authorized sanctions and procedures under Section 504. The third subsection describes the sanctions and procedures under Part B of EHA. The fourth subsection describes the problems with the present legal framework. The fifth subsection describes attempts to address the problems. The final subsection set out findings, conclusions, and recommendations.

B. The Legal Framework Under Section 504^{110/}

1. Overview

^{109/} The problems inherent in conducting a joint enforcement proceeding are discussed infra.

^{110/} Subpart G of the Section 504 regulation incorporates by reference the Title VI procedural regulations (45 C.F.R. §80.6-.10 and Part 81). Section 505 of the Rehabilitation Act of 1973, as added in 1978 requires the use of Title VI procedures in administering Section 504. Additional sanctions available under Section 504 are set out in Subpart A of the 504 regulation. Under Section 602 of the Title VI statute, federal agencies are permitted to effect compliance by determining or refusing to grant or continue to grant federal financial assistance or by any other means authorized by law. Several conditions control the power to employ fiscal sanctions. First, no sanctions are to be imposed until the recipient has been notified of its failure to comply and given an opportunity to achieve compliance by voluntary means. Second, assistance

(footnote cont.d from previous page)

may not be refused or curtailed absent an express finding on the record after an opportunity for an administrative hearing of recipient noncompliance. Third, the fiscal sanction must be limited to the particular political entity or recipient found in violation. Fourth, the sanction must be tailored to "the particular program or part thereof" in which noncompliance is proved. Fifth, the fiscal sanction is not effective until 30 days after the grantor has filed with the House and Senate committees having jurisdiction over the program involved a written report of its decision and grounds. Finally, judicial review of the administrator's action is explicitly provided.

The Title VI statute provides that Title VI regulations must be approved by the President. By Executive Order the presidential power to approve agency regulations has been delegated to the Attorney General, who, in turn, delegated responsibility to the Attorney General for Civil Rights. The order not only vests approval power but also authorizes the Attorney General to coordinate enforcement of Title VI by prescribing mandatory standards and procedures. (See Exec. Order 11247 (30 FR 12327 (1965)) and Exec. Order 11764 (39 FR 2575 (1974))).

In 1966, the Department of Justice initially promulgated a set of broad advisory guidelines. These broad guidelines were superseded in 1976 by a regulation which was designed to promote the implementation of Title VI and standardize Title VI procedures (28 C.F.R. part 42, Subpart F).

The Attorney General ordered federal agencies administering programs subject to Title VI to approve, with prior clearance of the Department of Justice, implementing regulations and guidelines. An agency's Title VI guidelines must contain descriptions, for each covered grant-in-aid program, of: the nature of Title VI coverage; methods of enforcement; examples of prohibited practices in the context of particular programs; required or suggested remedial action; and requirements concerning data collection, complaints, and public information.

Under the new guidelines issued by the Justice Department, recipients are required to disseminate to the public information concerning the Title VI program, including the nondiscrimination requirements, the rights of individuals under the Act and regulations and the procedures for asserting those rights. (§42.405) Agencies must collect data and information from grantees sufficient to permit effective enforcement of Title VI. (§42.406) The regulation identifies three major areas of compliance activity. One is the review of grant application for the purpose of determining compliance prior to the approval of federal financial assistance. (§42.407(b)) The assurances required by the grantor agency and accompanying data are checked for completeness and responsiveness. A second area is postapproval compliance review. (§42.407(c)) Each federal grantor agency must establish and maintain an "effective program" of this nature. This requires not only periodic submission of compliance reports by grantees but also field investigations of a representative number of major recipients. The third compliance area involves the receipt and processing of complaints of discrimination by program beneficiaries and others (§42.408) Each federal agency must establish procedures for the prompt processing and disposition of such complaints. All complaints having "apparent merit" must be investigated. All complainants and accused applicant/recipients of federal aid must be notified of the results. The

If an investigation conducted by OCR indicates a failure to comply with Section 504, the department, after notifying the recipient, must attempt to resolve the matter by informal means, whenever possible.^{111/} If the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance may be effected by suspension or termination or refusal to grant or to continue the assistance or by any other means authorized by law, including for example, referral to the Department of Justice to bring an action in the courts.^{112/}

In addition to the Title VI procedures set out in §80.6-.10- and Part 81, which are incorporated by reference by subpart G of the Section 504 regulation, the Section 504 regulation also includes several additional enforcement-related provisions. These provisions include:

(footnote cont.d)

regulation authorizes the federal agency to shift the initial responsibility of processing Title VI complaints to its grantees, but the grantor must verify the adequacy of the grantee's complaint procedures, must get a report of each complaint and investigation, and must retain the power to review grantee decisions. For programs involving formula grants to state agencies which then enter into subgrants, the state recipient is obliged to establish a Title VI program containing at least the same standards imposed on federal agencies by the regulations. (§42.410).

The Department of Justice regulation requires each federal grantor to assign sufficient personnel to its Title VI program so as to "ensure effective enforcement." (§42.414) The agencies are also instructed to develop a written enforcement plan. (§42.415) The plan must set out priorities and procedures for enforcement and address, at a minimum: The method for selecting recipients for compliance reviews, the establishment and timetables and controls for such reviews, the procedure for handling complaints, the allocation of its staff to different compliance functions, the development of guidelines, the determination as to when guidelines are not appropriate, and the provision of civil rights training for its staff.

^{111/} 45 C.F.R. §80.8(d).

^{112/} 45 C.F.R. §80.8(a).

(a) The mandatory submission of assurances by recipients,^{113/} (b) the designation of a Section 504 coordinator by larger recipients,^{114/} (c) the adoption of a grievance procedure by larger recipients,^{115/} (d) the provision of notice of nondiscrimination,^{116/} (e) remedial action,^{117/} (f) voluntary action,^{118/} and (g) self-evaluations.^{119/}

Section 203(c)(3) of the DEOA, establishing the Office for Civil Rights, provides that the Assistant Secretary for Civil Rights in carrying out his/her responsibilities is authorized to, among other things, enter into contracts and other arrangements for audits. The precise nature of this new authority is unclear.

In addition to the formal sanctions used by the federal government to secure compliance, the SEAs are expected to adopt "methods of administration" for overseeing compliance by LEAs.^{120/} The regulations do not prescribe the sanctions available to SEAs for securing compliance. Furthermore, the Section 504 regulation requires that LEAs establish a system of due process procedural safeguards for parents regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special education or related services.^{121/} The system must include among other things, notice, an

^{113/} 45 C.F.R. §84.5.

^{114/} 45 C.F.R. §84.7(a).

^{115/} 45 C.F.R. §84.7(b).

^{116/} 45 C.F.R. §84.8.

^{117/} 45 C.F.R. §84.6(a).

^{118/} 45 C.F.R. §84.6(b).

^{119/} 45 C.F.R. §84.6(c).

^{120/} 45 C.F.R. §84.4(b)(4). The Section 504 regulations presently do not include the Title VI requirement that SEAs adopt and obtain Department approval for methods and procedures through which subrecipients can be monitored for compliance with Section 504. An NPRM, which would require such a procedure, is working its way through the clearance process.

^{121/} 45 C.F.R. §84.36.

opportunity for a hearing for parents, and a review procedure.^{122/}

Set out below is a detailed description of the procedural requirements governing the use of the formal sanctions described above.

2. Due Process and Other Procedures Governing the Use of Fiscal Sanctions

No order suspending, terminating or refusing to grant or continue Federal financial assistance may become effective until (1) the responsible Department official has advised the applicant or recipient of its failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed under Title VI, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance must be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and must be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.^{123/}

3. Procedures Governing the Use of "Other Means Authorized By Law".

No action to effect compliance by any other means authorized by law may be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the

^{122/} Id.

^{123/} 45 C.F.R. §80.8(c).

recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts must be made to persuade the recipient or other person to comply with the regulation and to make such corrective action as may be appropriate.^{124/}

4. Hearings

A recipient may request a hearing.^{125/} The hearing will be held in Washington, D.C. unless the Department determines that the convenience of the recipient or the Department requires that another place be selected.^{126/} All hearings must be held before a hearing examiner designated in accordance with Section 11 of the Administrative Procedures Act (APA).^{127/} Recipients may be represented by counsel.^{128/} The hearing must be conducted in accordance with Section 5-8 of the APA.^{129/} Technical rules of evidence do not apply but rules designed to assure the most credible evidence will be used.^{130/}

5. Decisions and Notices

a. Decisions by Hearing Examiners -- After a hearing is held, the hearing examiner must either make an initial decision (if so authorized) or certify the record (including his/her recommended findings and proposed

^{124/} 45 C.F.R. § 80.8(d).

^{125/} 45 C.F.R. §80.9. This section is supplemented by rules of procedure set out in Part 81.

^{126/} 45 C.F.R. §80.9(b).

^{127/} Id.

^{128/} 45 C.F.R. §80.9(c).

^{129/} 45 C.F.R. §80.9(d).

^{130/} Id.

decision) to the reviewing authority for a final decision.^{131/} Copies of the initial decision or certification must be sent to the recipient and the complainant.^{132/} Exceptions to an initial decision may be filed by the department or recipient with the reviewing authority.^{133/}

b. Decisions on the Record or Review by the Reviewing Authority

-- Whenever a record is certified for a decision or the reviewing authority reviews the decision of a hearing examiner, the recipient must be given an opportunity to file briefs.^{134/} A copy of the reviewing authority's written decision must be given to the recipient and complainant.^{135/}

c. Review by the Secretary -- If the Secretary has not made the final decisions referred to above, a recipient or the department may request a review by the Secretary.^{136/} Such a review is not a matter of right and will be granted only where the Secretary determines that there are special and important reasons for his/her personal review.^{137/} He/she may also review a decision by the reviewing authority upon his/her own motion.^{138/}

d. Transmittal to Congressional Committees -- The Secretary must transmit the final decision to the appropriate committees of Congress.^{139/}

^{131/} 45 C.F.R. §80.10(a). §80.10 is supplemented by rules of procedure set out in Part 81.

^{132/} Id.

^{133/} Id.

^{134/} 45 C.F.R. §80.10(b).

^{135/} Id.

^{136/} 45 C.F.R. §80.10(e).

^{137/} Id.

^{138/} Id.

^{139/} Id.

6. Post-termination Proceedings

A recipient found in noncompliance must be restored to full eligibility if it satisfies the terms of the order or if it brings itself into compliance and provides assurances that it will fully comply.^{140/} The recipient may request full restoration of eligibility at any time.^{141/} If the department determines that the recipient is in compliance, it will restore eligibility.^{142/} If the recipient's request is denied, the recipient may submit a request for a hearing in writing.^{143/} It must thereupon be given an expeditious hearing, with a decision on the record.^{144/}

7. Judicial Review

Agency action taken against a recipient is subject to judicial review.^{145/}

C. Sanctions Available Under Part B of EHA

1. Federal Level

a. Overview — The actions available to the federal government for enforcing Part B of EHA are set out in Part B of EHA and its implementing regulations and GEPA. Enforcement actions available under Part B of EHA and GEPA at the federal level include: disapproval of state plans, withholding, suspension pending the outcome of a withholding action, public notice by the grantee of pending withholding action, conducting program and fiscal audits resulting in a demand for repayment of

^{140/} 45 C.F.R. §80.10(g)(1).

^{141/} 45 C.F.R. §80.10(g)(2).

^{142/} Id.

^{143/} 45 C.F.R. §80.10(g)(3).

^{144/} Id.

^{145/} See Section 602 of Title VI.

misspent funds, obtaining a cease and desist order from the Education Appeals Board, and changing the method of payment from a letter of credit system to a reimbursement system.

Set out below is a description of the procedures governing the use of the sanctions described above.

b. Panels and Boards Established to Hear Cases Alleging Non-compliance

(i) Introduction

Two administrative mechanisms presently exist for handling appeals by SEAs of adverse actions taken by the Secretary. Under Part B the Commissioner must appoint "hearing panels". Under GEPA, there exists an Education Appeals Board.

(ii) Hearing Panel Established Under Part B of EHA

Prior to disapproving a State plan (see below), withholding payments (see below) or granting a waiver from the supplanting provisions (see below), the Secretary must give the SEA notice and an opportunity for a hearing.^{146/}

The hearing is conducted by a panel consisting of not less than three persons appointed by the Secretary.^{147/} The hearing must be conducted in accordance with prescribed procedures.^{148/} The panel must prepare an initial decision, including findings of fact and conclusions based on those facts.^{149/} The initial decision is the final decision of the Secretary unless the Secretary informs the panel in writing

^{146/}45 C.F.R. §121a.580.

^{147/}45 C.F.R. §121a.581.

^{148/}See 45C.F.R. §121a.582.

^{149/}45 C.F.R. §121a.583(a).

that the decision is being reviewed.^{150/} Review by the Secretary is based on the initial decision, the written record (if any) and written comments or oral arguments by the parties.^{151/}

(iii) Educational Appeals Board

Section 451 of GEPA directs the Secretary to establish an Education Appeals Board. The functions of the Board include: conducting withholding hearings,^{152/} conducting audit hearings,^{153/} issuing cease and desist orders,^{154/} and conducting other proceedings designated by the Secretary.^{155/}

c. Disapproval of State Plans -- The Secretary must disapprove any plan that does not meet such requirements but not before he/she has given the SEA reasonable notice and an opportunity for a hearing.^{156/} The hearing must be held before the hearing panel and/or the Education Appeals Board (if disapproval hearings are designated by the Secretary).

d. Withholding^{157/} -- Whenever the Secretary finds, after reasonable notice and an opportunity for a hearing, that there has been a failure by an SEA or LEA to comply substantially with any requirement of law applicable to such funds, he/she must withhold payments under Part B of

^{150/} 45 C.F.R. §121a.583(c).

^{151/} 45 C.F.R. §121a.583(d).

^{152/} Section 453 of GEPA.

^{153/} Section 452 of GEPA.

^{154/} Section 454 of GEPA.

^{155/} Section 451(a)(4) of GEPA.

^{156/} 45 C.F.R. §121a.113(b) and (c); See also 45 C.F.R. §121a.580-.583 which set out the hearing procedures.

^{157/} The description in the text of the authority to withhold is an integration of the withholding provisions of Part B of EHA (see 45 C.F.R. §121a.590) and the provisions of Section 453 of GEPA, as added by P.L.95-561.

EHA (including payments for state or local administrative costs) and may withhold federal funds under any other program under his/her jurisdiction providing assistance for the education of handicapped children.^{158/}

The notice must state: the facts upon which the Secretary has based his/her belief and that the recipient is entitled to a hearing.^{159/} The hearing must be held before the hearing panel and/or the Education Appeals Board (see above).^{160/} With respect to withholding actions, the Board's decision is final unless the Secretary "for good cause shown" modifies or sets aside the decision, in which case the modified decision becomes the final decision or the recipient files a petition for judicial review.^{161/}

The Secretary may limit the withholding to programs or projects under the annual program plan or portions of it affected by the failure.^{162/} Further, the Secretary may not make further payments to specified LEAs affected by the failure to comply.^{163/}

Until the Secretary is satisfied that there is no longer any failure to comply, no further payments may be made to the state under Part B of EHA or funds under other programs providing assistance for the education of handicapped children or payments by the SEA must be limited to LEAs whose actions did not cause or were not involved in the failure.^{164/}

^{158/} The phrase "other programs..." includes, for example, Subpart 2 of Part B of Title I of ESEA (State operated programs for handicapped children) and Section 110(a) of the Vocational Education Act (set-aside for handicapped children).

^{159/} Section 453(b) of GEPA.

^{160/} Id. 45 C.F.R. §121a.581.

^{161/} Section 453(d) of GEPA; 45 C.F.R. §121a.593.

^{162/} 45 C.F.R. §121a.590(c).

^{163/} Id.

^{164/} 45 C.F.R. §121a.591(b).

e. Suspension Pending Decision to Withhold -- Pending the outcome of any withholding hearing before the Education Appeals Board, the Secretary may suspend payments to a recipient, after the recipient has been given reasonable notice and opportunity to show cause why such action should not be taken.^{165/} Under interim final rules issued by the Secretary of HEW, the Board will designate a person to hear the recipient's petition.^{166/} The designee must then issue a written decision, which is not reviewable by the Secretary. ^{167/}

f. Auditing -- The DEOA provides for the establishment of an Office of Inspector General, which is responsible for carrying out, among other things, fiscal and program audits of programs such as Part B of EHA.^{168/}

Audits prepared by the Inspector General are transmitted to the Secretary for action. Under Section 452(a) of GEPA, whenever the Secretary determines that an expenditure not allowable under Part B of EHA has been made by a State or LEA or such agency has failed to properly account for funds, he/she must give the SEA or LEA written notice of a final audit determination and at the same time notify the agency of its right to have the determination reviewed by the Education Appeals Board.^{169/}

An agency that desires to have an audit determination reviewed by the Board must submit an application for review.^{170/} Audit determinations containing insufficient detail to identify with particularity the

^{165/} Section 453(c) of GEPA.

^{166/} 45 C.F.R. §100e.28 (44 FR 30532, May 25, 1979)

^{167/} Id.

^{168/} Section 212 of DEOA. The Office must be established in accordance with the Inspector General Act of 1978 (as amended by Section 508(n) of DEOA).

^{169/} Section 452(a) of GEPA.

^{170/} Section 452(b) of GEPA.

expenditures which are not allowable must be returned to the Commissioner.^{171/} With respect to audit determinations that are sufficiently detailed, the burden is on the SEA or LEA to demonstrate the allowability of expenditures disallowed in the final audit determination.^{172/}

A decision by the Board with respect to an application for review is final unless: (1) the Secretary, for good cause shown, modifies or sets aside the decision, in which case the modified decision becomes final or (2) the SEA or LEA files a petition for judicial review.^{173/}

Subject to the notice requirement described in the next sentence, the Secretary may compromise any claim for which the initial determination was found to be not in excess of \$50,000 whenever it is determined that: (1) the collection of the amount is not practical or in the public interest and (2) the practice which resulted in the claim has been corrected and will not recur.^{174/} Prior to the exercise of his/her authority to compromise a claim, the Secretary must publish in the Federal Register a notice of his/her intent to do so.^{175/}

g. Payback of Recovered Funds -- Whenever the Secretary has recovered funds following a final audit determination, he/she may consider 75 percent of those funds additional funds available for that program and may arrange to repay to the State or local agency such an amount if he/she determines:

- (1) the noncompliant behavior has been corrected;

^{171/} Id.

^{172/} Id.

^{173/} Section 452(d) of GEPA.

^{174/} Section 452(f) of GEPA.

^{175/} Id.

- (2) the agency is currently in all other respects in compliance;
- (3) the agency has submitted a plan for the use of the funds for the population affected by the failure to comply; and
- (4) the uses of the funds would serve to achieve the purpose of the program. ^{176/}

Prior to entering into a payback arrangement, the Secretary must publish in the Federal Register a notice of his/her intent to do so and the terms and condition of the payback arrangement. ^{177/}

h. Cease and Desist Orders — In lieu of withholding funds (see above) the Secretary may request, in the form of a complaint, that the Educational Appeals Board issue an order requiring that the LEA or SEA cease and desist from the violation of law charged in its complaint. ^{178/}

The Board must hold a hearing to resolve the Secretary's complaint. ^{179/} If the Board finds that the LEA or SEA is violating Part B of EHA, it must make a written report stating its findings and issue the cease and desist order upon the agency. ^{180/} The report and order will be final on the sixtieth day following service on the agency unless the agency seeks judicial review. ^{181/} A cease and desist order may be enforced by withholding portions of the grant or certifying the facts to the Attorney General for appropriate action, including action in federal court. ^{182/}

^{176/} Section 456(a) of GEPA.

^{177/} Section 456(d) of GEPA.

^{178/} Section 454(a) of GEPA.

^{179/} Section 454(b) of GEPA.

^{180/} Section 454(c) of GEPA.

^{181/} Section 454(d) of GEPA.

^{182/} Section 454(e) of GEPA.

1. Waiver of Supplanting Provisions -- If a State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may grant a waiver from the supplement, not supplant provision.^{183/} The supplanting provision generally states that Part B of EHA funds must supplement, not supplant the level of state and local funds expended for the education of handicapped children.^{184/}

j. Monitoring and Technical Assistance -- Although SEAs play a key role in overseeing compliance by LEAs, OE is ultimately responsible for ensuring the appropriateness of programs under Part B of EHA, and expenditures thereunder.^{185/} The existing GEPA regulations provide that site visits will be made by representatives of DHEW or the Commissioner as frequently as possible to "review program accomplishments and management control systems and provide such technical assistance as may be required."^{186/}

k. Changing the System for Making Payments Under Part B of EHA -- Part B of EHA authorizes OE to determine whether the payment system will be by advances (letter of credit) or reimbursement and also the size of the installments.^{187/} Presently, payments under Part B of EHA funds are generally made through the advance method. However, the threat or actual switch to the reimbursement method would be a powerful weapon in that few agencies have excess cash to finance costs pending reimbursement.^{188/}

^{183/} 45 C.F.R. §121a.589.

^{184/} 45 C.F.R. §121a.230.

^{185/} See generally Section 451-456 of GEPA.

^{186/} 45 C.F.R. §100b.436 (1978).

^{187/} Section 620(b) of Part B of EHA.

^{188/} It should be noted that OMB Cir. A-102 provides detailed instructions on grantor selection of payment methods.

1. Reporting and Evaluation -- The Secretary must evaluate the impact of programs authorized under Part B of EHA and the effectiveness of State efforts to assure the provision of a free appropriate public education for all handicapped children.^{189/} Each year the Secretary must transmit to Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children including a detailed description of all evaluation activities.^{190/}

m. Judicial Review -- If any state is dissatisfied with the Secretary's final action with respect to its annual program plan, the state may file a petition for review of that action with the United States Court of Appeals for the circuit in which the state is located.^{191/}

2. State and Local Level Sanctions and Procedures

a. Overview -- The annual program plan is the most important compliance document. In general it contains: certifications, a designation of the single agency responsible for programs under Part B of EHA, oversight policies and procedures, programmatic policies and procedures, and data.

The enforcement provisions applicable at the state level include: application approval, withholding, public notice of withholding, auditing, and the provision of services directly by the SEA in lieu of the non-complying LEA.

^{189/} Section 618(a) of Part B of EHA.

^{190/} Section 618(d) of Part B of EHA.

^{191/} 45 C.F.R. §121a.593. See also Section 455 of GEPA.

The enforcement provisions applicable at the local level include the establishment of a system of due process procedural safeguards for parents (and LEAs) regarding the identification, evaluation, educational placement, and provision of a free appropriate public education to handicapped children. The system must include, among other things, notice, an opportunity for a hearing, and a review procedure.

b. Certifications — The annual program plan must include two certifications. First, the SEA officer authorized to submit the plan must certify that:

- (1) the plan has been adopted by the SEA; and
- (2) the plan is the basis for the operation and administration of activities carried out under Part B of EHA.¹⁹²

Second, the State Attorney General or authorized legal officer must certify that:

- (1) the SEA has authority under state law to submit the plan and administer or supervise the administration of the plan; and
- (2) all plan provisions are consistent with state law.¹⁹³

c. Single Line of Authority -- The annual program plan must include information which shows that the SEA is responsible for ensuring that the requirements of Part B of EHA are satisfied and that all educational programs for handicapped children (including programs administered by other public agencies) are under the general supervision of the SEA and meets educational standards of the SEA.¹⁹⁴

¹⁹² 45 C.F.R. §121a.112(a).

¹⁹³ 45 C.F.R. §121a.112(b).

¹⁹⁴ 45 C.F.R. §121a.134 and .600.

In other words, the SEA as a recipient of Part B funds is responsible for ensuring that all public agencies in the state comply with the provisions of the Act, regardless of whether they receive Part B funds.^{195/} The requirements under Part B of EHA are binding on each public agency that has direct or delegated authority to provide special education and related services in a State receiving assistance under Part B of EHA, regardless of whether that agency is receiving funds under Part B.^{196/}

d. Application Approval -- The SEA is responsible for approving applications for assistance under Part B of EHA.^{197/} Under Part B, the SEA may not disapprove an application until it has given the LEA reasonable notice and an opportunity for a hearing.^{198/} Under GEPA, the SEA must provide an opportunity for a hearing after it has decided to disapprove.^{199/} Further, GEPA provides the LEA a right of appeal of the SEA's action to the Commissioner.^{200/}

e. Withholding -- An LEA, after reasonable notice and an opportunity for a hearing, may withhold payments under Part B of EHA if it finds that the LEA has failed to comply with any requirement in its application.^{201/} LEAs may appeal an SEA's decision to the Secretary.^{202/}

^{195/} Comment, 42 FR 42501 (August 23, 1977).

^{196/} Comment, 42 FR 42478 (August 23, 1977).

^{197/} 45 C.F.R. §121a.193. GEPA permits the submission of LEA applications once every three years instead of on an annual basis.

^{198/} 45 C.F.R. §121a.144.

^{199/} Section 425 of GEPA.

^{200/} Id.

^{201/} 45 C.F.R. §121a.194.

^{202/} Section 425 of GEPA.

f. Public Notice of Withholding Action -- Any LEA receiving a notice from the SEA must notify the public of the pendency of the action.^{203/}

g. Monitoring and Evaluation -- Each SEA must undertake monitoring and evaluation activities to ensure compliance of all public agencies within the state with the requirements of Part B of EHA and develop procedure for monitoring and evaluating public agencies involved in the education of handicapped children.^{204/}

The legal framework also includes specific mandates to monitor compliance with the least restrictive environment provisions^{205/} and the provisions pertaining to the individualized education program requirements.^{206/}

h. Audits -- SEAs must conduct audits of federal fund utilization.^{207/} LEAs may appeal final SEA audit determinations to the Secretary.^{208/}

i. Complaint Resolution Procedures -- Each SEA must adopt effective procedures for reviewing, investigating, and acting on any allegations of substance made by public agencies, or private individuals or organizations of actions by a public agency that are contrary to the requirements of Part B of EHA, including the designation of a responsible person within the agency, provision for negotiations, technical assistance, and other remedial action, and provide for the use of sanctions, including withholding.^{209/}

^{203/} 45 C.F.R. §121a.194(b).

^{204/} 45 C.F.R. §121a.601.

^{205/} 45 C.F.R. §121a.556.

^{206/} 45 C.F.R. §121a.130(b)(2).

^{207/} 45 C.F.R. §121a.601(b)(3).

^{208/} Section 425(a) of GEPA.

^{209/} 45 C.F.R. §121a.602.

j. Proper Use of Part B Funds -- Each annual program plan must include policies and procedures designed to ensure that Part B funds paid to the State are spent in accordance with the requirements of Part B.^{210/}

k. Enforcement of Confidentiality of Information -- The SEA must describe in its annual program plan the policies and procedures, including sanctions, which the State uses to ensure the confidentiality of information.^{211/}

l. Recovery of Funds for Children Erroneously Classified -- Each annual program plan must include policies and procedures which ensure that the State seeks to recover any Part B funds spent for services to a child who is determined to be erroneously classified as eligible to be counted.^{212/}

m. Administrative Appeal of Due Process Hearings and Right to Bring Civil Action -- Any party aggrieved by the findings of an impartial hearing examiner may appeal to the SEA.^{213/} The SEA must conduct an impartial review of the hearing and render a written decision.^{214/}

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal to the SEA and any party aggrieved by the SEA's decision has a right to bring a civil action.^{215/}

n. Plans for Administrative Activities for the Upcoming Year -- Each annual program plan must include a description of each administrative activity the SEA will carry out during the next school year with its Part B funds set-aside for State administration.^{216/}

^{210/} 45 C.F.R. §121a.148.

^{211/} 45 C.F.R. §121a.575.

^{212/} 45 C.F.R. §121a.141.

^{213/} 45 C.F.R. §121a.510.

^{214/} Id.

^{215/} 45 C.F.R. §121a.511.

^{216/} 45 C.F.R. §121a.149(a)(3). Part B provides a separate authorization for State administration. See 45 C.F.R. §121a.620.

o Annual Evaluation -- Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluations of IEPs.²¹⁷

p. Direct Services by the SEA -- Under the circumstances described below, an SEA may not distribute funds to an LEA and must use those funds to ensure the provision of a free appropriate public education to handicapped children residing in the area served by the LEA. The SEA directly provides services if the LEA:

- (1) Is entitled to less than \$7,500 for that fiscal year (beginning with fiscal year 1979);
- (2) Does not submit an application that meets the requirements of §§ 121a. 220-121a.240;
- (3) Is unable or unwilling to establish and maintain programs of free appropriate public education;
- (4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; and
- (5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children²¹⁸

q. Enforcement Actions Applicable at the Local Level -- The primary enforcement provision applicable at the local level are the due process procedures for parents and children. Part B requires that each

²¹⁷/ 45 C.F.R. §121a.146.

²¹⁸/ 45 C.F.R. §121a.360.

SEA must ensure that public agency establishes and implements procedural safeguards^{219/} including, among other things:

- (1) opportunity to examine records;^{220/}
- (2) right to obtain independent evaluations;^{221/}
- (3) prior notice of proposals to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education or refusals to initiate or change or provide a free appropriate public education;^{222/}
- (4) parent consent before conducting preplacement evaluations and initial placements;^{223/}
- (5) the rights to an impartial due process hearing;^{224/} and
- (6) the right to confidentiality of records and the right to a hearing to challenge invasions of privacy.^{225/}

r. Appeals to the Secretary of Adverse Actions Taken By an SEA Against an LEA — LEAs are entitled to notice and an opportunity

for a hearing prior to an SEA's decision to disapprove an application, withhold funds, or seek repayment of funds pursuant to an audit determination.^{226/} LEAs subject to adverse actions by SEAs involving disapproval of application, withholding, and audit determinations may appeal the SEA's decision to the Secretary.^{227/}

^{219/} 45 C.F.R. §121a.501.

^{220/} 45 C.F.R. §121a.502.

^{221/} 45 C.F.R. §121a.503.

^{222/} 45 C.F.R. §121a.504.

^{223/} Id.

^{224/} 45 C.F.R. §121a.506. A public educational agency also has the right to initiate a hearing.

^{225/} See 45 C.F.R. §121a.560-.576.

^{226/} Section 425(a) of GEPA.

^{227/} Section 425(b) of GEPA.

D. Problems with the Present Legal Framework, as Modified by DEOA.

The problems with the present legal framework, as modified by DEOA can best be explained by way of illustration. Assume that a state adopts a policy which provides that LEAs are not required to provide a free appropriate public education to handicapped children. The policy clearly violates both Section 504 and Part B of EHA. Nonetheless the State claims that its policy is consistent with Section 504 and Part B of EHA. OCR and BEH decide to seek compliance by initiating enforcement action. The SEA demands a hearing.

Common sense would dictate that any system of enforcement established by the Education Department would (a) permit OCR and BEH to bring a single action against the SEA and (b) enable the SEA to defend against the action in a single forum.

Unfortunately, such is not the case. An action to withhold or terminate funds could conceivably proceed in three forums, subject to three sets of procedural requirements. For example, hearings regarding noncompliance with Part B of EHA are held before a Hearing panel²²⁸ and/or the Education Appeals Board.²²⁹ Hearings under Section 504 are held before a hearing examiner (administrative law judge) appointed in accordance with Section 11 of the Administrative Procedures Act.²³⁰ If the SEA wants to appeal the initial decision, three separate sets of procedures apply.²³¹

²²⁸/ See supra. at p. 80-81.

²²⁹/ See supra. at p. 80-81.

²³⁰/ See supra. at p. 77.

²³¹/ See supra. at p. 77-79 and 80-81.

The problems described above are not limited to cases brought under Section 504 and Part B of EHA. The same problems occur any time a particular SEA or LEA policy violates both a civil rights statute and a provision of a grant-in-aid program subject to GEPA.

E. Attempts to Address the Problem

The draft memorandum of understanding between BEH and OCR referred to supra, provides that under certain circumstances BEH and OCR should conduct concurrent investigations. However, the MOU is silent with respect to the procedure the agencies should use once a violation has been found.

F. Findings, Conclusions, and Recommendations

Set out below are our major findings, conclusions, and recommendations regarding the adequacy of the present system for coordinating enforcement actions under Section 504 and Part B of EHA.

First, the enforcement system operating at the federal level, as presently structured, does not permit a joint action by OCR and "BEH" against a single agency which has engaged in a practice that allegedly violates both Section 504 and Part B of EHA. Further, the recipient may be required to defend an action in at least two, possibly three forums. This situation is untenable.

Subject to the proviso in the next sentence, we recommend that the Education Department consider developing a consolidated enforcement procedure under which joint actions may be brought by OCR and another office responsible for administering a grant program. Such a change should not be initiated until the department commits adequate staff and resources to carry out the procedures. Persons interviewed regarding our proposed consolidation

of procedures expressed the fear that the department would not allocate sufficient resources to ensure that the consolidated procedures would be carried out in an effective and efficient fashion.

There are at least three approaches regarding the establishment of a consolidated enforcement procedure which ED should consider:

- (1) Expanding the jurisdiction of the Education Appeals Board established under GEPA to cover Section 504, Title VI, and Title IX,
- (2) Expanding the jurisdiction of the hearing examiner and reviewing authority established under Title VI to cover procedures brought under Part B of EHA, and
- (3) Developing a separate framework which the Secretary at his/her option, could use for handling cases brought under Section 504 and Part B of EHA.

We conclude that the first option of expanding the jurisdiction of the Education Appeals Board to cover actions brought under Section 504, Title VI, and Title IX could be accomplished by administrative action and would not require statutory change.^{232/} Our conclusion that a statutory change would not be required is based on the following premises.

(1) Sections 451(a)(1)-(3) provide that the Education Appeals Board must conduct audit hearings, withholding hearings, and cease and desist hearings. In addition, Section 451(a)(4) of GEPA authorizes the Education Appeals Board to conduct "other proceedings designated by the Secretary." Ostensibly "other proceedings" could include enforcement actions under Section 504, Title VI, and Title IX.

(2) Enforcement procedures available for enforcing Section 504 must be the same as those to enforce Title VI pursuant to Section 505 of the Rehabilitation Act of 1973, as amended in 1978.

^{232/} Consultation and approvable by the plaintiffs in Adams, supra. may be required.

(3) The regulation implementing the Education Appeals Board could be modified to be made consistent with basic principles governing the Title VI enforcement procedures set out in Section 602 of Title VI. ED will have to seek amendments to specific provisions in the Justice Department's guidelines for the development of Title VI procedures by other agencies (28 C.F.R. §42.401-.415) which are not mandated by Section 602. The consolidation effort will also require that HEW's Title VI enforcement regulations (45 C.F.R. §80.6-.10 and Part 81) be modified.

Notwithstanding the fact that the jurisdiction of the Education Appeals Board could be expanded to cover Section 504 without securing a statutory change, before such an action is taken the Secretary should determine the administrative capacity of the Board to handle the additional responsibilities. The Secretary should consider, among other things, the following factors:

- (1) The hearing procedures mandated under Title VI have been in existence for a number of years and they function adequately.
- (2) The Education Appeals Board has only been in existence since November 1, 1978.
- (3) The Board has not as of yet used its new cease and desist powers.
- (4) The Board is currently under-staffed and as a result there is a backlog of cases waiting resolution.

Any attempt to make the Title VI provisions applicable to Part B of EHA would require statutory amendment since Part B of EHA and GEPA expressly prescribe the use of Hearing Panels and/or the Education Appeals Board. The need to secure a statutory amendment to implement the third alternative will depend on the specific components of the procedure.

The second major finding is that the legal framework implementing Section 504 (including the HEW Title VI procedures which are incorporated by reference) does not include clear standards regarding an SEA's enforcement responsibilities and the procedures it must adopt when it does seek enforcement against an LEA or other agency operating an elementary or secondary education program. The lack of an adequate state-level framework contravenes the Title VI guidelines issued by Justice which require that Title VI regulations issued by federal agencies must require that SEAs establish a Title VI compliance program that complies with the minimum standards established for federal agencies (28 C.F.R. §42.410). In contrast to the Section 504 legal framework, the framework under Part B of EHA spells out in detail the range of sanctions SEAs are expected to use against non-compliant LEAs.

When the Education Department issues its Title VI enforcement procedures they should include detailed provisions prescribing the responsibilities and procedures to be followed by SEAs. In drafting the procedures, ED must also ensure that the state level procedures for implementing Section 504, Title VI, and Title IX are consistent with the state level procedures under Part B of EHA and other federal grant programs.